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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 573.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GISSEL PACKING CO., INC., ET AL.

No. 691.

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

vs.

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

OPINIONS BELOW.

The opinion of the Court of Appeals (A. 316-318) is reported at 398 F. 2d 336 (4 Cir. 1968). The decision and order of the National Labor Relations Board (A. 314-315; 250-309) are reported at 157 NLRB 1065.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1968 (A. 316). On September 17, 1968, Mr. Justice Black extended the time for filing the Union's petition for writ of certiorari to and including October 26, 1967. On September 26, and October 26, 1968, the Board (No. 573) and the Union (No. 691) respectively filed petitions. On December 16, 1968, both petitions were granted and consolidated for hearing (A. 321). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U. S. C. 160(e).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are set forth in the Supplemental Appendix, *supra*, pp. 1-13.

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Act, as amended, imposes the duty to recognize a union upon an employer only under circumstances: (1) where the union has been certified by the National Labor Relations Board after a Board conducted election or (2) where it can be proved that an employer has actual knowledge (by means other than authorization cards) that a union represents a majority of its employees in an appropriate unit.

2. Whether unambiguous authorization cards signed by a majority of employees unequivocally designating a union to represent them in respect to wages, hours and conditions of employment, are so inherently unreliable that an employer may refuse to recognize a union so designated without violating Section 8(a)(5) of the National Labor Relations Act, as amended.

3. Whether the Court of Appeals erroneously construed Section 8(a)(5) of the National Labor Relations Act, as amended, in concluding that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status on the possession of unambiguous authorization cards signed by a majority of the employees obtained without misrepresentation, coercion or taint of any kind.

STATEMENT.

A. The Board's Finding of Fact.

In 1960, Gissel Packing Company, Inc., hereinafter referred to as the Company or Employer, reacted to a Union organizing campaign by engaging in threats to refuse to bargain with the Union, to close its plant located in Huntington, West Virginia, or greatly to curtail its operations, and to discriminate against employees who joined the Union; the Company also implied that the employees would be given the benefit of group insurance if they rejected the Union.[1] In 1963, shortly after employee Mount was hired, Company Vice President Charles Gissel told him that the shop was non-union and that any employee

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1. After a hearing, a Trial Examiner found the above actions of the Company to be unfair labor practices violative of Section 8(a)(1) of the Act (Case No. 9-CA-2068). (Supp. A. 14-33.) No exceptions were filed to the Trial Examiner's Intermediate Report (A. 255).

"caught" talking to a Union representative would be discharged (A. 60).

In September 1964, aware of the Union's activities at two other Huntington plants,[2] Vice President Charles Gissel individually interrogated employees Frye and Mount as to whether they had engaged in conversations concerning the Union and threatened them with discharge if either was caught talking to a suspected Union agent (A. 265; 61, 93-94).

The Union resumed its organizing efforts in January 1965,[3] and between January 13 and 22, thirty-one of the forty-four to forty-seven unit employees signed unambiguous union cards[4] authorizing the Union to represent them in collective bargaining.

In January, employee Adkins heard Vice President Gissel tell a group of employees that "[i]f the Union got in,

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2. Unfair labor practice hearings involving *S. S. Logan Packing Co.*, 152 NLRB 421, modified 386 F. 2d 562 (4 Cir. 1967), and *Sehon Stevenson & Co., Inc.*, 150 NLRB 675, enforced 386 F. 2d 551 (4 Cir. 1967), had been held in Huntington, West Virginia in the summer and September of 1964, respectively.

3. All dates hereafter shall refer to the year 1965, unless otherwise specified.

4. The cards read (A. 264; 241):

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL # 347

P. O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions.

.....	.....
Employer's Name	Your Name
.....	.....
Employer's Address	Your Street Address
.....	.....
Date	City and State
	.....
	Your Telephone Number

he'd just take his money and let the Union run the place the way they wanted to" (A. 270; 134).

On January 22, Union representative Spencer advised Vice President Gissel that the Union represented a majority of employees and requested recognition and bargaining; Gissel refused "to talk about the Union" and referred Spencer to the Company's attorneys (A. 256; 12, 17-18). The same day, Spencer confirmed his telephone request for recognition in a letter to Gissel in which he offered to submit signed authorization cards to the Company, "so that there will be no possible doubt as to our majority status".[5]

On January 26, the Company rejected the Union's request in a letter which: (1) stated that the Union had lost an earlier NLRB election[6] and that the Company did "not believe that there has been any change in circumstance or opinion of our employees since that time"; (2) alleged that the Company was "advised" that the Union's organizing technique involved the obtaining of "signatures on so-called authorization cards by a variety of means and representations which are not compatible with a free exercise of an employee's choice", including information "of instances of direct misrepresentation in obtaining employees' signatures"; (3) denied that truck drivers were "a part of any appropriate bargaining unit"; and (4) invited the Union to file for a Board election (A. 257-258; 233). At no time did the Company avail itself of the opportunity under Section 9(c)(1)(B) of the Act to petition for an election (A. 288).

In the early part of February, Vice President Gissel (1) interrogated one employee as to whether he had heard any-

5. Spencer's letter noted that truck drivers were to be included in the requested unit (A. 257; 232).

6. The election referred to was held within thirty days after January 27, 1961, in a unit of production and maintenance employees "including truck drivers [and] truck driver salesmen * * *" (Supp. A. 34-38).

thing about the Union and if any Union man had been around to sign him up, (2) asked employee Moore whether employee Don Kidd was the leader of the Union, stating that Kidd would be immediately discharged if Gissel discovered him to be such a leader,[7] (3) requested Moore to report to Gissel all he could learn about the Union, including the names of the employees who had signed cards, (4) asked employee Frye (a) if he knew anything about the Union, (b) what the Union had offered him and (c) stated that he could offer Frye more than the Union could,[8] (5) asked an employee if he would join in a "walk-out",[9] (6) told a group of employees "[t]he hell with the Union * * * I'm going to leave [the plant] and turn it over to them,"[10] (7) later in February said to a group of employees that he did not want "to hear any more about this Union stuff"—to "get out" if they could not do their work and (8) to another employee, Gissel threatened that the Union would

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7. Much of the conduct in the instant case found by the Board to have violated Section 8(a)(1) is similar to the unfair labor practices committed by this Company in 1960 (NLRB Case No. 9-CA-2068). In that case the Board found *inter alia* that Herbert Gissel unlawfully had told employees that only those who did not sign Union cards would retain their jobs (Supp. A. 22-23).

8. In 1960 Company President Paula Gissel in a captive audience speech to all employees promised the benefit of group insurance if they rejected the Union (Supp. A. 20).

9. In the earlier case, Paula Gissel told employees that those who wanted to walk out could do so, that the plant could still operate with a smaller work force (Supp. A. 17).

10. During the previous union organization campaign at Gissel in 1960, Paula Gissel told employees that rather than accept the Union she would close the plant or greatly curtail its operations. This threat was confirmed by Herbert Gissel and Edward Gissel who on separate occasions told different groups of employees that their mother (Paula) would shut down the plant and draw social security before accepting a union (Supp. A. 17, 23, 24-25).

have to "fight him first", stating that it would not "get in" (A. 268-270; 62, 94-96, 102-104, 111-112, 134, 141).[11]

In this context, on February 10, Spencer by letter renewed the Union's request for recognition, pointing out that "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employers is most difficult for us to combat" (A. 258; 235). Spencer again offered to deliver the signed cards to the Company for check against payroll records to prove the Union's majority (A. 258; 235). Vice president Gissel answered on February 12, asserting that the Union's "approach * * * bolsters our opinion that you do not really honestly represent a majority of the employees." No other reason for doubting the Union's majority was given (A. 259; 237-238). Replying on February 16, the Union made a final unsuccessful attempt to achieve recognition from the Company, again offering the authorization cards for inspection (A. 260; 239).

In March and April the Company continued its anti-Union campaign (1) by interrogating employee Burchell as to whether employee Mount had said anything about a Union, directing him to stay away from Mount, who would be "bad" for him (A. 268-269; 103-104), (2) by further inquiring of Burchell as to whether employee Hysell had induced Burchell to attend a Union meeting or sign a card (A. 269; 104), (3) by engaging in surveillance of a Union meeting (A. 268, 271-274, 283-286; 63-65, 89-90), (4) by asking Mount, in the presence of Frye, whether he attended the meeting, telling him Gissel had knowledge of such Union meeting attendance (A. 275; 65, 90), and (5) by changing

11. Charles Gissel was repeating the threat made by his mother a few years before that attempts by employees to designate a union as their collective bargaining representative were futile gestures because the Company would not recognize the Union even if the employees desire it (Supp. A. 20-21).

the hours of work of Mount and Frye and subsequently discharging them with a profane reference in respect to what they could do with the Union (A. 276-283, 286; 67-68, 93).

MAJORITY.

As noted above, thirty-one employees in a unit of forty-four to forty-seven employees signed unambiguous union authorization cards. No employee was told that the card would be used to get an election, that a majority had already signed, that initiation fees would be waived or that he would lose his job if he did not sign.[12] Indeed, the only statements made to employees pertinent to the cards were that the cards would be presented by the Union to the Employer to achieve recognition and bargaining (A. 56). Moreover, there is no evidence that any of the employees changed his mind about designating the Union to represent him. On the contrary, there is evidence of continued adherence to the Union, for the record reflects that a substantial number of employees, "perhaps all but three", attended a Union meeting in April (A. 274; 138).

B. The Board's Conclusion and Order.

The Board concluded that the Company interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act by interrogating employees about their Union activities and the conduct of the Union, asking them to learn of the Union activities of others, threatening them with discharge, promising economic benefits, and creating the impression of and engaging in surveillance; the Board also concluded that employees Mount and Frye were discriminatorily discharged in violation of Section 8(a)(3) and (1), and further concluded that the Company violated

12. All of the Union's authorization cards herein were obtained without misrepresentation, coercion or taint of any kind.

Section 8(a)(5) and (1) of the Act in respect to its refusal to recognize the Union which had been designated by a substantial majority of employees by their execution of unequivocal authorization cards in a clearly appropriate unit (A. 299).

The Board rejected the claim that the Company had a good faith doubt as to the Union's majority status[13] for the reasons that (1) it ignored the Union's offer to submit for examination and comparison with payroll signatures the signed authorizations upon which the Union relied; (2) it failed to file an employer's representation petition with the NLRB; (3) its asserted reasons for refusing to recognize the Union were unsubstantiated or insubstantial;[14]

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13. The Trial Examiner, after finding that the Company's refusal to bargain was not motivated by a good faith doubt of the Union's majority, noted that "there is language in *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, which suggests that a good faith doubt concerning the Union's majority is no defense to a refusal to bargain if the Union in fact represented a majority." (A. 291, n. 41). The Board stated that it "need not" rely upon the Trial Examiner's interpretation of the *Bernhard-Altmann* case, *op. cit.*, in concluding that Respondent violated Section 8(a)(5) of the Act (A. 315, n. 2), see *infra*, pp. 80-83.

14. (1) As noted above, no evidence was presented to support the Company's charge that authorization cards were obtained by misrepresentation or other means incompatible with a free exercise of an employee's choice (A. 263-264, 288; 56).

(2) The Company understood that the Union's requested unit was the same as that found by the Board to be appropriate in 1961. The Board, citing *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291 (4 Cir. 1964), held further "that 'even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal to bargain charge where the unit is proper'" (A. 287, n. 38).

(3) The Company's evidence that its representatives "decided that maybe they [the Union] might not have a majority" because it lost an NLRB election four years earlier was inconsistent with the frequently exercised right of employees to change their minds. The Board further found that a similar argument had been rejected by the Fourth Circuit in *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962).

(4) its course of unfair labor practice conduct both before and after the Union's request for recognition constituted (a) an "absolute refutation" of the Company's good faith claim, (b) a program to destroy the Union's majority, and (c) "a positive rejection by the Company of the principle of collective bargaining." The Board also rejected the contention of the Company that a Union can never establish its majority on the basis of cards but can do so only in a Board-conducted election.[15]

The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily discharged, to bargain with the Union upon request, and to post appropriate notices (A. 301-303, 315).

C. The Decision of the Court of Appeals.

The Court held that substantial evidence supported the Board's findings that the Company coerced its employees in the exercise of their rights in violation of Section 8(a)(1) of the Act and discriminatorily discharged two employees because of their Union membership and activity in violation of Section 8(a)(3) and (1) (A. 317). The Court rejected the Board's conclusion that the Company had re-

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15. In finding a violation of Section 8(a)(5), the Board relied upon this Court's decision in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, 74-75, 76 S. Ct. 559, 566-567 (1965); the Fourth Circuit's decisions in *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291, 292 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962) and *N. L. R. B.* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 422 (4 Cir. 1951); and the following decisions in other circuits: *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 393 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209 (9 Cir. 1954) (A. 287-291).

fused to bargain in violation of Section 8(a)(5) and (1). *Inter alia*, the Court said (A. 317-318):[16]

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here * * *.

3. *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied 36 LW 3403, [390] U. S. [1028]; *NLRB* v. *S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's Inc.*, 4 Cir., [398] F. 2d [337] (decided this day).

1. The 1947 Amendments.

To appreciate the full impact of the cryptic decision of the Fourth Circuit herein, it must be considered in the light of the cases cited in its opinion[17] and other of its

16. The Court made reference to the Company's claimed doubt of the Union's majority "buttressed by the fact that a few years earlier the Union had lost a valid secret election after a similar claim of majority status." The Court made no mention of the unfair labor practices of the Company which antedated the election. See *supra* pp. 3-4, ns. 7-11 (A. 317).

17. See n. 3 of quotation, above (App. 318). Particularly inapposite is *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028 (1968). That case presented issues involving the Board's *Cumberland Shoe* doctrine [*Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (6 Cir. 1965)], and *Bernel Foam* doctrine [*Bernel Foam Products, Inc.*, 146 NLRB 1277], neither of which is involved in the instant *Gissel* case. In *Crawford, op. cit.*, the Court found that considerable misapprehension in the minds of employees in respect to the purpose of the authorization cards was generated by representations of the Union's organizer—a fact not extant herein. Apparently *N. L. R. B.* v. *General Steel Products, Inc., etc.*, in No. 573, consolidated herewith, contains issues relating to the *Bernel Foam* and *Cumberland Shoe* doctrines of the Board. *Sinclair Co.* v. *N. L. R. B.*, in No. 585, scheduled for argument on the same day as *Gissel*, also apparently involves the Board's *Bernel Foam* rule.

recent decisions.[18] The Fourth Circuit's doctrine was first and most fully enunciated in *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 568-570 (1967), where the Court held that the elimination in the 1947 amendments of the Act of the phrase "any other suitable method" from Section 9(c) withdrew from the Board the authority to order an employer to bargain with a union, absent an NLRB certification, unless factually the employer has no doubt (based upon evidence other than authorization cards) that the union represents a majority of the employees.[19] The Court said that where the employer has no doubt of the union's majority status "there is no question of representation to resolve", but "[a] question concerning representation exists * * * when a determination of the union's status and the employer's doubt of it is dependent upon a choice of dubious or debatable inferences arising from * * * evidentiary facts" [386 F. 2d at 569]. Hence, the Court concluded that the resolution of a question concerning representation thus defined was restricted to a secret ballot Board-conducted election [386 F. 2d at 562].[20] Conse-

18. Such additional cases include: *General Steel Products, Inc.* v. *N. L. R. B.*, 398 F. 2d 339 (4 Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968); cf. *N. L. R. B.* v. *Preiser Scientific, Inc.*, 387 F. 2d 143 (4 Cir. 1947); *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968).

19. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, the Court specifically held that the employer's polling of employees gave him such actual knowledge of majority. Analyses of *N. L. R. B.* v. *Preiser Scientific, Inc.*, 387 F. 2d 143 (4 Cir. 1967) and *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968) and the corresponding Board decisions (*Preiser Scientific, Inc.*, 158 NLRB 1375 and *Lifetime Door Company*, 158 NLRB 13) disclose that the Fourth Circuit sustained each refusal to bargain order of the Board on the Court's view of actual knowledge of majority in each case, except that, as noted *infra* n. 20, *Lifetime Door, op. cit.* does not easily fit into this mold.

20. In *N. L. R. B.* v. *Heck's Inc.*, 398 F. 2d 337 (4 Cir. 1968) involved in No. 573, the Fourth Circuit said [at n. 3]: "Even the Board has agreed with our construction of the Act.

"Section 9(c) of the Act, as amended, prescribes the elec-

quently, it held that no violation of Section 8(a)(5) can adhere to an employer who claims a doubt as to the majority status of a union requesting recognition based on authorization cards and employer scienter of the union's majority status being unprovable by means other than such signed authorization cards.

2. The Alleged Unreliability of Authorization Cards.

In *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, the Court said "[it] would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' * * *", that "[t]he unreliability of the cards * * * is inherent * * * and that [386 F. 2d at 566]:

> An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards and their signatures.[21]

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tion by secret ballot as the sole method of resolving the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives" Annual Report of the NLRB for 1948 at p. 32.

It is difficult to perceive how the Court can assert Board agreement with its construction of the Act when it has held contrarily in every similar case since the Fourth Circuit's *Logan* decision and where the Court saw fit to reverse the Board in at least four refusal to recognize cases since that time. The language in the Thirteenth Annual Report of the NLRB obviously referred only to cases where it could issue a Board *certification*. In the Fourteenth Annual Report of the NLRB, 1949, at pp. 19-20, the Board made it clear that it could issue a certification to a union which was recognized by the employer, a view diametrical to that expressed by the Fourth Circuit in *Logan, op. cit.* at 568-570.

21. "In *N. L. R. B.* v. *Logan Packing Co.* [386 F. 2d 562 (4 Cir. 1967)], decided this day, we have considered at some length the serious unreliability of signed authorization cards as an indication of the wishes of a majority of the employees. Because of that unreliability, they should not be accepted as proof of the union's

In *Logan, op. cit.* at 567, 568, the Court suggested that upon the receipt of a Union's claim of majority and a request for recognition "[t]he natural response of an employer entertaining real doubt of the Union's claim is an affirmative investigatory one," and "[a] finding of a Section 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of good faith doubt of the Union's majority • • •. But in typical cases, subsequent unfair labor practices have a tendency to prove only the employer's opposition to the Union's organiza-

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claim of majority status, and an employer is entitled to doubt the union's claim as long as it is so unreliably founded." *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 553 (4 Cir. 1967).

In *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968), the Court appeared to predicate its decision of a Section 8(a)(5) violation on the fact that the employer failed to state that it doubted the union's majority status. Judge Sobeloff, speaking for the majority, reiterated the valid analysis made in *N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (4 Cir. 1962) and *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 292, (4 Cir. 1964), that the resolution of a genuine doubt of a union's majority status lies in the filing by the employer of a petition under Section 9(c)(1)(B) of the Act. Judge Boreman, concurring in *Lifetime Door, op. cit.*, stated that "[t]here was nothing to indicate any doubt whatever by the Company that the Union had been selected by a majority of the employees as their representative." However, *Lifetime Door, op. cit.*, in accepting union majority status based on authorization cards, seems inconsistent with other Fourth Circuit decisions beginning with *Logan* and thereafter. It suggests a division within the Court itself with Judge Sobeloff adhering to the pre-*Logan* construction of the Act, [he dissented in *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), and wrote a special concurring opinion in *N. L. R. B.* v. *Sehon Stevenson Co., Inc.*, 386 F. 2d 551 (4 Cir. 1967)], Judge Bryan appearing to take an *ad hoc* position predicated on the particular facts in each case [voting to find a Section 8(a)(5) violation in *Lifetime Door, op. cit.*, and *N. L. R. B.* v. *Preiser Scientific Inc.*, 387 F. 2d 143 (4 Cir. 1967), and against such violation in *Crawford Mfg. Co.* v. *N. L. R. B., op. cit.*, and *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968)] and the remaining Fourth Circuit Judges apparently subscribing to the rationale of Judge Haynsworth in *Logan*.

tional efforts; they throw no light on his belief or disbelief of the Union's claim of majority status."[22]

SUMMARY OF ARGUMENT.

I.

In 1935, when the National Labor Relations Board Act was passed, Congress stated the policy of the United States to be to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of negotiating the terms and conditions of their employment." In implementation thereof, Congress enacted Section 8(5) (renumbered Section 8(a)(5) in 1947), which "declares it to be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a). * * * § 9(a), which deals expressly with employee representation,

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22. The Court specifically rejected its holding in *N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (4 Cir. 1962) that violations of Section 8(a)(1) or (3) subsequent to a bargaining demand may constitute "a refutation of any good faith doubt of the union's claim of majority status." *Logan, op. cit.* at n. 23. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, after finding the employer guilty of two illegal discharges, restraint and coercion in violation of Section 8(a)(1) and (3), the Court said [386.F. 2d at 554]:

> If we had no more in this case than the cards and the finding of violation of Section 8(a)(1) and (3) the Board's order to bargain would not be enforced for the reasons we state today in *Logan*.

In *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998, 1000, 1002 (1968), the Fourth Circuit sustained the Board's findings that the employer had engaged in coercive interrogation, surveillance and threats in violation of Section 8(a)(1) and had discriminatorily discharged six employees in a unit of fifty-six, but held that such illegal conduct did not "undercut the substantiality of its [the employer's] doubts [of the Union's majority status]."

says nothing as to how the employees' representatives shall be chosen * * * [and] does not make it a condition that the representatives * * * shall be certified by the Board, or even be eligible for such certifications * * *". *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559, 564-575 (1956).

Although the National Labor Relations Act was subjected to the white heat of the crucible of Congressional re-evaluation, reconsideration and amendment in 1947 and 1959, both the policy of the Act fostering collective bargaining and the implementation thereof survived unseared and unchanged and exist in the Act today in identical language to that originally authored by Congress in 1935.

Prior to 1967, this Court and all courts of appeals, including the Fourth Circuit, were in agreement that an employer violated Section 8(a)(5) of the Act when he refused to recognize for purposes of collective bargaining a union representative which had been designated by a majority of his employees by virtue of unambiguous, untainted signed authorization cards. Efforts were made in the Congress that passed the Taft-Hartley amendments in 1947 to change this rule. The bill passed by the House of Representatives sought to amend Section 8(a)(5) by substituting the phrase "currently recognized by the employer or certified as such under Section 9" for the existing phrase "subject to the provisions of 9(a)".

The House Report in its version of the bill made it clear that certification following a Board-conducted election would be the exclusive method of achieving recognition and that an employer would not violate Section 8(a)(5) by refusing to recognize a union designated by a majority of its employees, absent such Board certification. Congress in passing the Senate bill, which retained the language of Section 8(a)(5) as written in the Wagner Act, refused to foist

upon Section 8(a)(5) the election and certification requirements of Section 9(c) and thereby expressed its intention to maintain the interpretation accorded Section 8(a)(5) prior to 1947.

The Fourth Circuit has pounced upon the deletion of the phrase "any other suitable method" from Section 9(c) in 1947 as a basis for its novel theory that Congress intended to proscribe the Board from concluding that an employer had violated Section 8(a)(5) predicated upon a refusal to recognize a designated bargaining agent where the majority proof lay in signed authorization cards. The internal design of the Act and the legislative history of the 1947 Taft-Hartley Amendments show unmistakably that this deletion prohibited the National Labor Relations Board from issuing a Board *certification* based upon cards, petitions, strikes, etc. (and such other methods of proof which were acceptable under the Wagner Act), and specifically was intended to withdraw from the Board the power to issue certifications, based upon cross-card checks, a practice which had continued into 1947. However, since Congress rejected certification as a prerequisite to a refusal to recognize violation, the elimination of the above phrase from Section 9(c) could not affect the existing rights and obligations under Section 8(a)(5) which are subject only to the provisions of Section 9(a).

Moreover, the restriction of certifications under Section 9(c) to the Board election processes is consistent with Congressional intent in 1947 to expand the significance of certifications implicit in the design of Section 8(b)(4)(B), (C), and (D) of the Act. More specifically, the change in Section 9 of the Act wrought by the 1947 amendments which has relevance to a refusal to recognize violation is the addition of Section 9(c)(1)(B) wherein the employer is accorded a right to file a petition for an election with the National Labor Relations Board where he has a real doubt

that the union requesting recognition represents a majority of his employees or where competing unions are claiming such recognition, and, wherein the Board is given exclusive authority to determine the existence of a question concerning representation to be resolved by a secret election.

Despite Congressional awareness of this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.* and the uniformity of court decisions predicating Board bargaining orders on authorization card majorities between 1947 and 1959, Congress did not amend Section 8(a)(5) or Section 9. Indeed, the enactment of Section 8(b)(7) in 1959 further upgraded the value of certification by exempting a certified union from the proscriptions against organizational and recognition picketing by unions. The legislative history of that Section accorded full recognition to the continued right of employees to choose their bargaining representative by means other than an election.

II.

The Fourth Circuit's doctrinaire assertion that authorization cards are inherently unreliable is based on a misapplication of Board rules dealing with two-union situations and is in contravention of (1) established law which regards signatures on documents as presumptively valid and reliable indicia of the signer's intent, (2) Board and judicial acceptance of signatures on authorizations as impressing upon an employer the duty to recognize, and (3) Congressional affirmance in Sections 302, 9(c)(1)(A), 9(e), 8(b)(7) and 401(e) that signed authorizations are a reliable and essential element of the Taft-Hartley and Landrum-Griffin labor laws. Analysis of election procedure reveals that, although elections theoretically permit exposure of employees to "both sides of the issue," they also expose employees to employer restraint, coercion, intimidation, discharge and multitudinous other employer influences which

adversely affect the employees' free choice. In sum, the Fourth Circuit's decisions in the instant and all post *Logan* cases are "the product of an obsession with the infirmities of authorization cards, and a romanticizing of the validity of an election. Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status * * *. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election", 65 Mich. L. Rev. 851, 861-862.

III.

Factually, Gissel presents a classic example of a respondent who runs the gamut of unfair labor practices—from restraint and coercion through discriminatory discharge—and then complains that its employees were not given a "free choice" in a Board election. But, although Section 9(c)(1)(B) of the Act grants the employer the power to set Board election machinery in motion, the Company here studiously avoided filing a petition. Under these circumstances, the Company's rejection of the Union's request to recognize and bargain with it in an appropriate unit, made contemporaneously with a tender of a majority of unit employees' signed valid unambiguous authorizations, was a violation of Section 8(a)(5) of the Act. And, thereby the Board's order to bargain, upon request, is an appropriate remedy under Section 10(c) of the Act. *International Association of Machinists [Serrick Corp.]* v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct 397 (1942); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 703-706, 64 S. Ct. 817, 818-819 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 687, 64 S. Ct. 830, 835 (1944).

Assuming *arguendo*, that the Company had a "good

faith'' doubt in respect to the Union's majority status, its refusal to recognize the Union as the employees' bargaining representative would be violative of Section 8(a)(5), inasmuch as an employer's ''good faith'' doubt is not relevant to his duty to recognize the designated bargaining representative of his employees. This conclusion follows from decisions of the Board and the courts that an employer acts at his peril when he mistakenly, albeit in good faith, refuses to recognize a union where (1) he believes the unit description to be improper, (2) the unit description is unclear and varies from the unit found by the Board to be appropriate, and (3) he believes the election establishing the union's majority is invalid.

In practical terms, the ''good faith'' test *vis-a-vis* a union's majority status has created serious problems of consistent administration because of the intrinsic difficulty of establishing objective and workable standards for delving into the state of mind of an employer. No combination of words or phrases has avoided a cacophony of discordant conflicting and fluctuating opinions emanating from the Board and the courts.

But this Court in *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, 81 S. Ct. 1603, 1607-1608 (1961), held that a good faith belief that a union represented a majority of its workers was no defense to a violation of Section 8(a)(2) where the union did not in fact represent a majority. Predicating its holding on protected employee rights and acknowledging the relationship between Section 8(a)(5) and Section 8(a)(2) in this respect, the Court said that ''prohibited conduct cannot be excused by good faith'' and where ''an employer in good faith * * * rejects a union claim, the validity of his decision may be tested in an unfair labor practice proceeding,'' citing Section 8(a)(5). In view of the foregoing and the right of an employer to assuage any real doubt of a union's majority by filing an employer

petition for an election, there is no basis in logic, reason, policy or the internal construction of the Act for according an employer the privilege of evading his statutory duty to recognize the union of his employees' choice, by a showing of good faith.

ARGUMENT.

I.

THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, IMPOSES UPON AN EMPLOYER A DUTY TO RECOGNIZE A UNION UNDER SECTION 8(a)(5) WHERE THE UNION HAS BEEN DESIGNATED BY A MAJORITY OF EMPLOYEES BY MEANS OTHER THAN AN NLRB ELECTION.

> [T]he refusal by [some[23]] employers to accept the procedure of collective bargaining lead[s] to strikes and other forms of industrial strife or unrest which have the * * * necessary effect of burdening or obstructing commerce * * *. [P]rotection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the free flow of commerce * * *. It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the *practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing* for the purpose of negotiating the terms and conditions of their employment * * *[24] [emphasis supplied].

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23. The word, "some", was added by the 1947 amendments.

24. The House bill in 1947, H. R. 3020, contained no public policy statement with respect to the promotion of collective bargaining. H. R. 3020, Report No. 245, p. 3, I Legislative History of the Labor Management Relations Act, 1947, p. 33. Significant is the fact, that despite such attempt to eliminate the above quoted

Thus spake Congress in 1935, setting forth its findings and policies in the National Labor Relations Act, 29 U. S. C. § 151. And although this Act has experienced the white heat of the crucible of Congressional reevaluation, reconsideration and amendment in 1947 and 1959, the foregoing stated policy of Congress has not changed.

Unchanged also since 1935 is the section of the Act which, in implementation of Congress' policy to foster union recognition and collective bargaining, rendered it an unfair labor practice for an employer to refuse to bargain with a union which had been designated or selected by its employees in an appropriate unit for the purposes of collective bargaining, 29 U. S. C. § 158(a)(5) [§ 8(a)(5)].[25] Interpreting and applying Section 8(a)(5) of the Act, the Board early recognized that at least two obligations were imposed by such section upon each employer, i.e., (1) a duty to recognize a union which has been designated or selected by a majority of his employees in an appropriate unit, and (2) a duty thereafter to negotiate in good faith with such exclusive bargaining agent of his employees. The issues presented in the instant case involve only the interpretation and application of the employer's duty to recognize the designated or selected majority representative of the employer's employees.

This Court has consistently held that the Board is justified in finding that an employer violates Section 8(a)

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findings and policies of the Wagner Act, Congress adopted the Senate bill which in identical language reaffirmed the national policy to encourage the practice and procedure of collective bargaining. Ross, Phillip, *The Government as a Source of Union Power*, 134-135, Brown University Press, 1965; cf. *N. L. R. B.* v. *Drivers etc., Local No. 639* [*Curtis Bros. Inc.*], 362 U. S. 274, 289-290, 80 S. Ct. 706, 714-715 (1960).

25. In 1947 all employer unfair labor practices were renumbered by the insertion of an "(a)" between "Section 8" and the particular number of the subsection. For consistency herein we shall use the post Taft-Hartley designations throughout.

(5) where he refuses to recognize for purposes of collective bargaining a union representative which has been designated by a majority of his employees who have signed unambiguous authorizations: *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 918 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944). Indeed, every court of appeals, including the Fourth Circuit, has accepted such majority designation based upon signed authorization cards as a valid basis for imposing upon an employer the duty to recognize such union pursuant to Section 8(a)(5).[26] In *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (1967), upon which the instant *Gissel* decision is based, the Fourth Circuit rejected the right of a union to obtain recognition from an employer based upon authorization cards where the employer does not have actual knowledge (predicated upon evidence other than such cards) that the union represents a majority of its employees. This novel notion has been specifically rejected

26. This rule was accepted by the courts before the 1947 amendments to the Act: *N. L. R. B.* v. *Clinton Hobbs Co.*, 132 F. 2d 249 (1 Cir. 1942); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756 (2 Cir. 1940); *N. L. R. B.* v. *Schmidt Baking Co.*, 122 F. 2d 162 (4 Cir. 1941); *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552 (6 Cir. 1940); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780 (9 Cir. 1940); see also: *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473 (10 Cir. 1940), as well as between 1947 and 1959, the year when the Landrum-Griffin amendments were impressed upon the Act: *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *N. L. R. B.* v. *Ken Rose Motors Inc.*, 193 F. 2d 769 (1 Cir. 1952); *N. L. R. B.* v. *Marcus Brothers*, 272 F. 2d 253 (2 Cir. 1959); *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3 Cir. 1954); *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720 (4 Cir. 1950); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844 (4 Cir. 1950); *N. L. R. B.* v. *Lewis Motor Co., Inc.*, 180 F. 2d 254 (5 Cir. 1950); *N. L. R. B.* v. *Armco Drainage & Metal Products Inc.*, 220 F. 2d 573 (6 Cir. 1955); *N. L. R. B.* v. *Taitel*, 261 F. 2d 1 (7 Cir. 1958); *N. L. R. B.* v. *Wheeling Pipe Line Inc.*, 229 F. 2d 391 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206 (9 Cir. 1954); *N. L. R. B.* v. *Hamilton*, 220 F. 2d 492 (10 Cir. 1955).

by several courts of appeals,[27] flies in the face of over thirty years of Board and judicial interpretation[28] and is patently inconsistent with the legislative history of the 1947 and 1959 amendments to the Act.

A. The 1947 Amendments Did Not Divest the Board of Its Authority to Order an Employer to Recognize a Union Whose Majority Status Is Based on Authorization Cards.

In considering the amendments to the Wagner Act in 1947, the House passed a bill which sought to amend Section 8(a)(5) to read as follows: "To refuse to bargain collec-

27. The First, Fifth and Sixth Circuits appear to have repudiated the *Logan* rationale [*N. L. R. B.* v. *Sinclair Co.*, 397 F. 2d 157, 161-162 (1 Cir. 1968); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712-713 (5 Cir. 1968); *N. L. R. B.* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660 (6 Cir. 1968)]; the Second Circuit has spurned it [*N. L. R. B.* v. *United Mineral & Chem. Corp.*, 391 F. 2d 829, 836 (2 Cir. 1968); *N. L. R. B.* v. *Big Ben Department Store, Inc.*, 396 F. 2d 78, 82 (2 Cir. 1968); *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565, 568 (2 Cir. 1967), certiorari denied, ... U. S. ....., 88 S. Ct. 2055 (1968)]; and the Third, Ninth, Tenth, and District of Columbia Circuits, without reference to *Logan* or the Fourth Circuit, have failed to follow or apply it. *Steel City Transport* v. *N. L. R. B.*, 389 F. 2d 735 (3 Cir. 1968), *N. L. R. B.* v. *C. & C. Packing Co.*, ... F. 2d ..... (9 Cir. 1969), 70 LRRM 2245; *N. L. R. B.* v. *Merrill*, 388 F. 2d 514, 519 (10 Cir. 1968); *International Union, United Auto Workers* [*Preston Products*] v. *N. L. R. B.*, 392 F. 2d 801 (D. C. Cir. 1967), certiorari denied, 88 S. Ct. 2058 (1968); see also *N. L. R. B.* v. *Quality Markets, Inc.*, 387 F. 2d 20, 23 (3 Cir. 1967), where the Court, quoting Board language in *Sunbeam Corp.*, 99 NLRB 546, 550-551, out of context (see *infra*, pp. 46-49, n. 86), accepted the principle, often enunciated by the Board, that an employer's rejection of a union's demand for recognition supported by authorization cards signed by a majority of unit employees is violative of Section 8(a)(5), unless the employer "has a 'good faith' doubt that the union actually commands the purported majority." In finding such a violation based upon an authorization card majority the Court, in substance, held that such cards are not inherently unreliable as interpreted by the Fourth Circuit in *Gissel* and *Logan*.

28. See *supra*, p. 23 and n. 26, 27; see *infra*, pp. 30-33, 68-69.

tively with the representative of his employees currently recognized by the employer or certified as such under Section 9", thus substituting the phrase "currently recognized by the employer or certified as such under Section 9" for the language "subject to the provisions of Section 9(a)." H. R. 3020, p. 21, I Legislative History of the Labor-Management Relations Act, 1947, p. 178.[29]

The House Report in its version of the bill made it clear that certification under Section 9 would be the exclusive method of achieving recognition and that an employer would not violate Section 8(a)(5) by refusing to recognize a union designated by a majority of its employees, absent a Board certification. House Report No. 245 on H. R. 3020, p. 30, I Legis. Hist. LMRA, 1947, p. 321. Indeed, the House bill intended to grant an employer the option of deciding whether or not to recognize an uncertified union which had been designated by a majority of his employees. *Ibid.* "If he wishes not to recognize an uncertified union, or having recognized it stops doing so, the union may ask the Board to certify it under § 9." *Ibid.*

If the Congress had adopted the House bill in this context, the Fourth Circuit's interpretation of Section 9(c) *vis-a-vis* Section 8(a)(5) undoubtedly would have been justified.[30] But the Congress rejected the House bill in this respect and accepted the Senate version instead. Since the Senate bill retained the language of Section 8(a)(5) as written in the Wagner Act [S. 1126, p. 13, I Legis. Hist.

29. Hereafter, the Legislative History of the Labor-Management Relations Act 1947 will be abbreviated: "Legis. Hist. LMRA, 1947" and the Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 will be abbreviated: "Legis. Hist. LMRDA, 1959."

30. The Fourth Circuit in *Logan* relied upon the Taft-Hartley amendments to Section 9(c) to conclude that the Board could not determine that a labor organization represented a majority of employees in a unit without the benefit of a Board-conducted secret ballot election, 386 F. 2d at 368-370; see *supra*, pp. 12-13.

LMRA, 1947, p. 511], Congress rendered the refusal to bargain "subject to the provisions of Section 9(a)" and refused to foist upon Section 8(a)(5) the certification requirements of Section 9(c).[31] Cf. *N. L. R. B.* v. *Drivers, etc., Local Union No. 639* [*Curtis Bros. Inc.*], 362 U. S. 274, 289-290, 80 S. Ct. 706, 714-715 (1960); see also, Sutherland, *Statutory Construction,* 3d ed., 1943, Vol. 2, § 5015.

In *Logan,* the Fourth Circuit postulates that the 1947 deletion of the phrase, "any other suitable method," from Section 9(c) divested the Board of its authority to order an employer to bargain with a union where it had rejected the union's majority claim based upon authorization cards. While it is clear that such amendment rendered Board-conducted elections the exclusive road to *certification,* it is equally clear that the design of the 1947 amendments upgraded the value of a Board certification *vis-a-vis* recognition based upon majority designation, though, as noted above, not rejecting the latter. The Wagner Act history of certifications is instructive in this regard.[32]

For a few years after the passage of the Wagner Act, the Board issued, without an election, certifications based upon cards, petitions, strike participation, statements signed by a majority of employees, membership cards, membership applications, affidavits of membership signed by a majority of employees, stipulations of majority signed by the union

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31. See *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U. S. 62, 71-73, n. 8, 76 S. Ct. 559, 564-565, n. 8 (1956).

32. Section 9(c) under the Wagner Act provided that whenever a question concerning representation arose, the Board could investigate such controversy and certify a union representative after "a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

and the employer, and various other methods of proof.[33] However, by 1939, the Board had abandoned the use of any basis for certification other than (1) election, (2) stipulation on the record by both parties to representation hearings, or (3) consent cross checks of authorizations against company records. See *General Box Company,* 82 NLRB 678, 683 and n. 17; NLRB, *Seventh Annual Report,* 1942, p. 58. So although the Wagner Act gave the Board wide discretion in determining bases for certification, the Board gradually developed the policy of "investing its *certifications* with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices" [emphasis added]. *General Box Company,* 82 NLRB at 683. Significantly, where possible, to expedite certification proceedings by obviating the necessity for an election, the Board continued to rely upon consent cross checks of union cards against company payrolls as a basis for issuing certificates of majority status. *Carnegie-Illinois Steel Corp.,* 40 NLRB 532; *Aluminum Co. of America, Chicago Works,* 56 NLRB 216; see *General Box Company,* 82 NLRB at n. 17.[34] Thus, the deletion of the phrase "or utilize any other suitable method" from Section 9(c) withdrew from the Board its authority to issue certifications based upon cross checks. That such was the intent of Congress was made plain by Senator Murray's concern over the

33. See, e. g.: *Delaware-New Jersey Ferry Co.,* 1 NLRB 85 (membership cards); *Atlantic Refining Co.,* 1 NLRB 359 (petition); *Rabhor Co., Inc.,* 1 NLRB 470 (strike participation); *Lykes Brothers Steamship Co., Inc.,* 2 NLRB 102 (sworn testimony); *Duplex Printing Press Co.,* 1 NLRB 82 (stipulation between parties); see also, NLRB, *First Annual Report* 1936, pp. 103-104; NLRB, *Second Annual Report* 1937, pp. 108-109.

34. The Board's Rules & Regulations [Series 4, § 203.48, effective 1946] provided that with the approval of the NLRB Regional Director, the parties to a representation proceeding could enter into (1) a consent election or (2) a consent card check, either procedure held under the Board's direction and supervision. Thereafter, the Regional Director would issue a certification (if the union's majority status was confirmed) or a report of the results of the election or cross check (if no certification issued).

imposition of a ban upon such "useful and appropriate devices"[35] to accelerate resolution of Section 9 cases:[36]

> The effect of the provision of Section 9(c)(4)[37] read together with the provisions of Section 9(c)(1) would be to prohibit the Board from determining an issue concerning representation by means of a consent card check. This procedure is utilized only where the parties consent and consists of a check of the union's membership cards against the names appearing on the employer's pay roll. Consent card checks make possible a quick determination of whether the employees desire a bargaining representative; they obviate the necessity for a formal proceeding in cases in which there are no issues of fact, thus allowing the Board more time to devote to litigated matters, and they have resulted in substantial saving in both personnel and money.

Manifestly, the deletion of the Section 9(c) language "or utilize any other suitable method", requires a Board-conducted election as a condition precedent to the issuance of a *certification*, but, as noted above, Congress rejected certification as a prerequisite to a refusal to bargain violation. See *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96, 101, 75 S. Ct. 176, 180 (1954). Having tightened the restrictions on procedures for achieving certification, in enacting the Taft-Hartley amendments, Congress accorded a more important role to certification as compared to that which existed under the Wagner Act.[38]. Thus, after the Taft-Hartley amend-

35. 93 Cong. Rec. 6656 (daily ed. June 6, 1947) (remarks of Senator Murray), II Legis. Hist. LMRA 1947, p. 1567.

36. 93 Cong. Rec. 6664 (daily ed. June 6, 1947) (analysis by Senator Murray of Amendments of National Labor Relations Act), II Legis. Hist. LMRA 1947, p. 1582.

37. In view of the deletion of the phrase "or utilize any other suitable method", from § 9(c), Senator Murray was criticizing Congress' inclusion of § 9(c)(4) which as an exception to § 9(c) permitted waiver of hearing in consent election cases without provision for the waiver of election in consent cross-check cases. See *supra*, n. 34.

38. There were few, if any, advantages of certification over recognition in the Wagner Act.

ments, advantages were given to certified unions over unions recognized by the employer without the benefit of a Board certification:

1) A certified union is protected from concerted action engaged in seeking its overthrow by another raiding union;[39]

2) Only a certified union can "lawfully induce the employees of some 'other employer' to engage in a strike * * * for the purpose of compelling the primary employer to recognize it";[40]

3) A Board certification grants a right to a union to engage in concerted action in support of a jurisdictional dispute;[41]

4) The legality of certain concerted activities sponsored by one union to assist another union in gaining recognition has been held by the Board to turn upon whether the latter union had been certified.[42]

In addition, the Board's long-standing "one-year rule" granting a certified union a right to recognition for a reasonable period of time, normally one year from the date of certification[43] "endows a certified union's status with a measure of security and permanence not enjoyed by a union

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39. § 8(b)(4)(C).

40. § 8(b)(4)(B); *General Box Company*, 82 NLRB 678, 680.

41. § 8(b)(4)(D), *ibid.*, at 681. It should be noted that the same right is accorded a union where the Board has issued a refusal to bargain order, but not to a union which is voluntarily recognized. Without question, in jurisdictional cases a certification grants earlier protection than a Board unfair labor practice order.

42. *General Box Company, op. cit.*

43. *Ray Brooks*, 98 NLRB 976, enforced, 204 F. 2d 899 (9 Cir. 1953), affirmed, 348 U. S. 96, 75 S. Ct. 176 (1954).

whose majority standing and right to recognition is established otherwise * * *."[44]

In view of the foregoing, the conclusion is inescapable that Congress in its 1947 amendments rendered Board certifications more meaningful and severely limited the avenues open to certification, but also determined to leave unchanged the duties and obligations of employers to recognize the representative designated by their employees by means other than an election. *Ray Brooks* v. *N. L. R. B., op. cit.; United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559 (1956); *cf. N. L. R. B.* v. *Drivers, etc., Local Union No. 639* [*Curtis Bros. Inc.*], *op. cit.*

B. In 1956 This Court Acknowledged an Employer's Obligation to Recognize a Labor Organization Designated by a Majority of Employees Upon Signed Authorization Cards.

In *United Mine Workers* v. *Arkansas Oak Flooring Co.*,[45] 351 U. S. 62; 76 S. Ct. 559 (1956), this Court said that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority

44. *General Box, op. cit.*, at 681. A union recognized by proof of majority is subject to a rival union petition and a petition for decertification prior to the conclusion of bargaining which will prevent a lawful employer from executing a contract with the recognized union. Not so with a certified union. *General Box, op. cit.* at 681-682.

45. The basic issue in *Arkansas Oak Flooring, op. cit.*, centered upon the rights of a labor organization which had failed to comply with Section 9(f), (g) and (h) of the Act and involved the problem of federal preemption. There it was held that a state court may not enjoin picketing by a union designated by a majority of eligible employees, the object of which was to obtain the employer's recognition, where the union had not filed affidavits and data then required under Section 9(f), (g) and (h) of the Act. It should be noted that this decision was specifically cited with approval on the floor of the Senate during the debates which led to the Landrum-Griffin amendments. 105 Cong. Rec. 16,400 (daily ed. September 3, 1959), II Legis. Hist. LMRDA 1959, p. 1429.

status" [351 U. S. at n. 8, 76 S. Ct. at n. 8], that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act" [351 U. S. at 69, 76 S. Ct. at 564] and that [351 U. S. at 71-72, 76 S. Ct. at 564-565]:

> Section 8(a)(5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions* of section 9(a)." * * * Section 9(a), [n. 7 omitted] which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *National Labor Relations Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407.[46] It does not make it a condition that the representative * * * shall be certified by the Board, or even be eligible for such certification.

Significantly, the cases cited by this Court as examples of methods other than a Board election "by which an employer may satisfy himself as to the union's majority status" are cases in which the employers were found guilty of violating Section 8(a)(5) for refusing to recognize as the bargaining agents of their employees, union which had been designated by authorization card majorities or signatures of a

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46. The interesting discussion in *Lebanon Steel, op. cit.* should not be overlooked: "The Wagner Act requires no specific form of authority to bargain collectively. * * * An application for union membership implies authority to bargain [citations omitted]. Likewise with registration cards [citation omitted], notwithstanding the signers have not paid dues or initiation fees or been admitted to membership. * * * Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as the employees' representative in collective bargaining." Particular attention should be paid to the Court's analysis of the sufficiency of voluntarily executed dues check-off cards as to grants of authority to the union to bargain for the employees. *Ibid.* at 408; see *infra*, pp. 37-44.

majority of employees on petitions[47] [351 U. S. at n. 8, 76 S. Ct. at n. 8].

Thus, in the cited *Bradford Dyeing* case[48] this Court characterized the union which had been designated by a majority of employees' signed cards[49] as "the bargaining representative selected by the untrammelled will of the majority" [310 U. S. at 339, 60 S. Ct. at 929] and sustained the Board's order to bargain with such bargaining representative. *National Labor Relations Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-922 (9 Cir. 1955), cited by this Court in *Arkansas Oak Flooring, op. cit.*, also involved a refusal to recognize violation predicated upon cards signed by a majority of employees designating the union as bargaining representative. So, too, did other cited cases: *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 260-261 (9 Cir. 1954);[50] *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8, 12, 14 (1 Cir. 1951).[51]

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47. No distinction in principle exists between signatures of a majority of employees on authorization cards and such signatures on a single petition. If anything, the former constitutes a freer expression of employees' choice since it would appear to be less affected by earlier signings.

48. *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 818 (1940).

49. The Board found that on the critical date the charging union had 465 or 467 signed cards out of a total unit of less than 780 employees. See *Bradford Dyeing Ass'n*, 4 NLRB 605, 615; see also, 310 U. S. at 339, 60 S. Ct. at 929.

50. In the *Parma Water* case, *op. cit.*, there was also an informal vote at an employee's home.

51. Interestingly, *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501, 503-504 (7 Cir. 1954) was cited—a case involving a claimed violation of Section 8(a)(2) of the Act where the employer recognized and signed a contract with a new association designated by a majority of employees' signatures on a petition in the face of a representation claim of an incumbent union which had reached an impasse in collective bargaining. Cf. *Indianapolis Newspapers, Inc.*, 103 NLRB 1750 (7 Cir. 1953). The Seventh Circuit said [at 504]: "What respondent has done is merely to accept petitions

Thus, although *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.*, did not specifically involve a refusal to recognize violation under Section 8(a)(5), it is clear that this Court determined that the 1947 amendments did not render necessary any judicial alteration in the existing decisional law. Inexorably, it brushed aside the arguments predicated on the 9(f), (g) and (h) of the Taft-Hartley amendments unequivocally to restate the law that Section 8(a)(5) imposes an obligation on an employer to recognize and bargain with the representative of the employees' choosing, whether or not such representative is certified by the Board or designated by a majority of employees on signed cards or petitions. See also, *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 81-82, 61 S. Ct. 83, 89-90 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944).

C. Congress Made No Change in Section 8(a)(5) or Section 9 in 1959, But by Adding Section 8(b)(7) to the Act Increased the Value of a Certification While Maintaining an Employer's Obligation to Recognize a Union Designated by a Majority of Its Employees.

Despite Congressional awareness of this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.*[52] and the uniformity of decisions predicating Board

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tendered by one of the competitors as proof of the success of its campaign. The record discloses no reason why the authenticity of this claim of majority status should have been subject to any doubt. Respondent's recognition of the Association was a legitimate, if not the mandatory, course of action. * * *".

52. 105 Cong. Rec. Sen. (daily ed. 16,400 September 3, 1959), II Legis. Hist. LMRDA 1959, p. 1429(2).

bargaining orders on authorization card majorities between 1947 and 1959,[53] Congress did not attempt in 1959 to amend Section 8(a)(5) or Section 9 to proscribe such action. See *N. L. R. B.* v. *Gullet Gin Co.*, 340 U. S. 361, 365-366, 71 S. Ct. 337, 340-341 (1951). However, the enactment of Section 8(b)(7) in 1959 and the legislative history of that section demonstrates Congress' cognizance of the obligation of an employer to recognize a collective bargaining agent which has been designated by a majority of employees by such means as signed authorization cards[54]

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53. See *supra* n. 26. Courts of Appeals frequently have cited this Court's decision in *Arkansas Oak Flooring, op. cit.*, in support of their decisions to enforce NLRB bargaining orders based on union authorization cards: *District 50, U. M. W.* [*Bowman Transportation, Inc.*] v. *N. L. R. B.*, 237 F. 2d 585 (D. C. Cir. 1956); *N. L. R. B.* v. *Sinclair Co.*, 397 F. 2d 157 (1 Cir. 1968); N. L. R. B. v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Quality Markets Inc.*, 387 F. 2d 20, 23 (3 Cir. 1967); *Bilton Insulation Inc.* v. *N. L. R. B.*, 297 F. 2d 141, 144 (4 Cir. 1961); *Skyline Homes Inc.* v. *N. L. R. B.*, 323 F. 2d 642, 647 (5 Cir. 1963); *N. L. R. B.* v. *Universal Gear Service Corp.*, 394 F. 2d 396, 398 (6 Cir. 1968); *N. L. R. B.* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (6 Cir. 1965); *Borden Cabinet Corp.* v. *N. L. R. B.*, 375 F. 2d 891, 893 (7 Cir. 1967); *Jas. H. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432, 436 (8 Cir. 1965); *N. L. R. B.* v. *Ralph Printing & Lithographing Co.*, 379 F. 2d 687, 693 (8 Cir. 1967); See also: *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 254 (2 Cir. 1963).

54. See 105 Cong. Rec. Sen. 5765, 5963, 5964, 5965, 5977 (daily eds. April 21, 24, 1959), II Legis. Hist. LMRDA 1959, pp. 1080(3), 1186(2)-(3), 1187(1), 1188(1), 1188(2), 1200(3); 105 Cong. Rec. House 13092, 13877, 14183 (daily ed. July 27, August 5, 11, 1959), II Legis. Hist. LMRDA 1959, pp. 1523(2), 1541(2), 1556(2); Senator Cooper stated that when a majority of employees adhered to a union by means other than an election, "[u]nder the Taft Hartley Act they [sic., the union] have a right to be recognized." 105 Cong. Rec. Sen. 5977 (daily ed. April 24, 1959), II Legis. Hist. LMRDA 1959, p. 1200(3). Senator Dirksen said that "[u]nder the present law" an employer who has recognized a majority union representative, without certification may be picketed by another union. "This is an unfair situation because under the law the employer must recognize and bargain with the union having majority status, whether or not it is certified." 105 Cong. Rec. Sen. 1568 (daily ed. February 4, 1959), II Legis. Hist. LMRDA, 1959, p. 994.

and shows the legislative intent to increase the value of a certification[55] (Supp. A. 4-6). Hence, while Section 8 (b)(7) was designed generally to proscribe "blackmail", organizational and recognition picketing by unions, in clear language a "labor organization [that] is currently certified as the representative of such employees" is exempted from its operation. Section 8(b)(7) (Supp. A. 4-6), *Dayton Typographical Union No. 57* v. *N. L. R. B.*, 326 F. 2d 634, 636 (D. C. Cir. 1963). The Court of Appeals for the District of Columbia has said that the legislative history of Section 8(b)(7) "reflects a conscious and intentional acceptance by the Senate Conferees—and by Congress—of the House-sponsored requirement for *current certification* of a union, and conscious and intentional abandonment by the Senate Conferees—and by Congress—of the Senate-sponsored provision which would have exempted unions having majority status, even though not certified, from the ban of picketing imposed by Section 8(b)(7)." *Dayton Typographical Union No. 57* v. *N. L. R. B. op cit.* at 638.[56]

Thus, in 1959 an additional benefit of certification was added to the one year certification rule and the advantages of certification inherent in Section 8(b)(4)[57] (see *supra*, pp. 28-30), while full recognition was accorded to the right of employees to choose their bargaining representative by means other than an election. In the face of this continuing history, it is no wonder that every court of appeals has followed the well-established rule of accepting desig-

55. 105 Cong. Rec. Sen. 5961 (daily ed. April 24, 1959), II Legis. Hist. LMRDA p. 1184(2); 105 Cong. Rec. House 16320, Legis. Hist. LMRDA p. 1263(1).

56. For an analysis of relevant legislative history, see *Dayton Typographical Union No. 57* v. *N. L. R. B., op. cit.*

57. It should be noted that the advantages of certification under Section 8(b)(4) were expanded in 1959 when the loopholes therein were closed. See: *N. L. R. B.* v. *Servette, Inc.*, 377 U. S. 46, 51, 84 S. Ct. 1098, 1102 (1964); *Maritime Union* [*Delta Steamship Lines Inc.*] v. *N. L. R. B.*, 346 F. 2d 411 at n. 8 (D. C. Cir. 1965).

nation by a majority of unit employees based upon signed authorization cards as a valid basis for imposing upon an employer the duty to recognize such union pursuant to Section 8(a)(5).[58]

Surprising, however, is the rejection by the Fourth Circuit of established precedent in the instant cases, particularly in view of its acute awareness of unsuccessful legislative attempts to change an employer's obligation to recognize a majority union under Section 8(a)(5).[59] The most recent bill submitted to Congress (91st Cong. 1st Session, S. 426) would amend Section 8(a) to provide "[t]hat such bargaining representatives shall have been certified by the Board as the result of an election conducted in accordance with subsection (c)" and to divest from the

58. *N. L. R. B.* v. *Greenfield Components Corp.*, 317 F. 2d 85 (1 Cir. 1963); *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 (2 Cir. 1962); *Steel City Transport* v. *N. L. R. B.*, 389 F. 2d 735 (3 Cir. 1968); *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *American Manufacturing Co. of Texas*, 351 F. 2d 74 (5 Cir. 1965); *N. L. R. B.* v. *Nelson Mfg. Co.*, 326 F. 2d 397 (6 Cir. 1964); *N. L. R. B.* v. *Larry Faul Oldsmobile Co.*, 316 F. 2d 595 (7 Cir. 1963); *Jas. H. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432 (8 Cir. 1965); *Retail Clerks Local 1179* [*John P. Serpa*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967); *Snow & Sons* v. *N. L. R. B.*, 308 F. 2d 687 (9 Cir. 1962); *N. L. R. B.* v. *George Groh & Sons*, 329 F. 2d 265 (10 Cir. 1964); *International Union of United Automobile Workers* [*Aero Corp.*] v. *N. L. R. B.*, 363 F. 2d 702 (D. C. Cir. 1966); *International Union of United Automobile Workers* [*Preston Products Co.*] v. *N. L. R. B.*, 392 F. 2d 801 (D. C. Cir. 1967), certiorari denied, 88 S. Ct. 2058 (1968).

59. The Court in *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d at n. 9 (4 Cir. 1967) quoted from the Hearings before the Subcommittee on Labor, 87th Cong. 1st Sess. on S. 256 to Repeal Section 14(b) of the National Labor Relations Act (1965). A prime consideration in those hearings was the possibility of amending "the so-called card check system of compelling union recognition": Senator Javits, Senate Labor Subcommittee Hearings, *op. cit.*, p. 5, *inter alia*, see *ibid.* pp. 16, 19-25, 180-189. Thus, the Fourth Circuit must have been aware that as recently as June, 1965, Congress acknowledged and declined to amend the law requiring an employer to recognize and bargain with a union basing its majority status on signed authorization cards.

Board the authority to issue a bargaining order where the union has not been certified pursuant to a Section 9 (c) election.[60] This bill is identical to S. 22, submitted by Senator Fannin in January 1967, in respect to which the 90th Congress took no action. The fact that the right to obtain majority representation by means other than a Board-conducted election and the "concomitant * * * duty to bargain with the Union"[61] so designated has weathered partisan efforts at emasculation and has survived unrevised through a holocaust of amendments over a thirty-three year period proves the viability of the basic statutory scheme. Cf. *Sinclair Refining Co.* v. *Atkinson*, 70 U. S. 195, 203-204, n. 16, 82 S. Ct. 1328, 1333, n. 16 (1962).

II.

DESIGNATION BY A MAJORITY OF EMPLOYEES ON UNAMBIGUOUS AUTHORIZATION CARDS OBTAINED WITHOUT MISREPRESENTATION OR COERCION IS AS RELIABLE AN INDICATOR OF EMPLOYEE WISHES AS AN ELECTION.

A. Unambiguous Authorization Cards Are Not Inherently Unreliable.

In the instant cases, *Logan Packing* and other recent cases,[62] the Fourth Circuit has asserted its belief that authorization cards signed by employees are inherently

60. This bill submitted by Senator Fannin in January 1969 has been referred to the Committee on Labor and Public Welfare. A copy of this bill is reprinted in the Supplemental Appendix, pp. 40-42, for the convenience of the Court.

61. *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d 173 (7 Cir. 1966).

62. *N. L. R. B.* v. *Logan Packing Co.*, 386 F. 2d 562 (1967); *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551 (1967); *N. L. R. B.* v. *Gissel Packing Co.*, 398 F. 2d 336 (1968); *N. L. R. B.* v. *Heck's*, 398 F. 2d 337 (1968); *General Steel Products* v. *N. L. R. B.*, 398 F. 2d 339 (1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968).

unreliable and should not be "accepted as proof of the union's claim of majority status".[63] This assertion is contrary to the overwhelming weight of common law which historically has extended legal recognition and contractual sanctity to an individual's signature.

Modern society has vastly expanded the utilization of signatures as legally valid and reliable indicia of the signer's intent. The following are but a few of the myriads of uses recognized as legally binding, without question or further proof of intent, to which signatures are put: leases, bank checks and drafts, petitions, charge account sales, options, releases, applications, powers of attorney, loans, notes, wills, and contracts of every use and variety.[64] Reliance on signatures as presumptively valid has become increasingly commonplace. Petitions are utilized to promote the passage of legislation.[65] Pleadings in court invoke judicial processes on the strength of signatures. Garnishment suits based on signatures of confession of judgment notes empower employers to deduct monies from the wages of employees without their approval.[66] On occasion, the most recent in the 1968 presidential campaign, signatures of a certain percentage of the voters on petitions obviates the necessity of a candidate's participation in election primaries in order to be nominated for office.[67] Likewise,

63. *N. L. R. B.* v. *Sehon Stevenson & Co.*, 386 F. 2d at 553.

64. See Wigmore on Evidence, Vol. 7, § 2134.

65. On October 14, 1966, Time Magazine reported (at p. 39) that in the November 1966 elections 346 statewide propositions would appear on ballots in 46 states—many of them placed there on the strength of signatures on petitions.

66. See e.g. Smith-Hurd Illinois Annotated Statutes, Chapter 57.

67. Reference is to the candidacy of George Wallace for the Office of President of the United States. Wallace achieved a place on the November 1968 ballot in many states on the sole strength of signatures on petitions. See MacDonald Austin F., *American State Government and Administration*, Thomas Y. Crowell Co., New York, 1955, pp. 146-149.

in commercial sales law, the consummation and resulting legal obligations of unambiguous contracts depend upon the intention to authenticate the document—an intention presumed from the affixation of signatures.[68]

The reliability and presumptive validity of signatures recognized in commercial law applies with equal force to labor law. Union authorization cards are unilateral contracts wherein the employee offers to delegate authority to the union if the union agrees to represent such employee in bargaining with the employer. When the union takes the initial step to bargaining of gaining recognition on the basis of such authorization cards, they are binding contracts. See *Corbin on Contracts*, § 21. Similarly, agency law considers written authorizations creating the agency relationship as documents of the highest solemnity, binding as long as they express the clear intent to delegate the power to act on behalf of the principal. See *Mechem Outlines Agency*, Sections 25, 40-42. Contingency fee and/or retainer agreements authorizing the lawyer to represent the client are binding contracts on the strength of the client's signature (5 Am. Jur., Attorneys at Law, §§ 31, 32). Similar contracts are recognized and enforced by courts without questioning the intent behind such agreements; indeed the parole evidence rule prevents the courts from looking beyond the terms of a written agreement, clear on its face, to determine the intent of the parties. There is no basis in principle nor logical reason for refusing to accord such lawful contracts in the labor arena the sanctity which their counterparts in every other phase of the law enjoy.[69]

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68. It should be noted that the Uniform Commercial Code Article on Sales Law does not even require the formality of a signature—initials, rubber stamps or even a thumbprint will suffice. Section 1-201 and Comment 39 thereto.

69. See cases cited *infra*, pp. 40-42, ns. 77, 79.

As noted above, since 1935 the Board and the Courts have accepted the signatures of employees on authorization cards, membership applications, petitions, etc. as proof of majority status impressing a duty on employers to recognize the union so designated.[70] Indeed, in recognition of the purposes of the Act, to foster the freedom to organize and the right to collective bargaining of employees a majority of whom choose a union to represent them, the law has properly relaxed the requirements of the formality of an employee's signed authorization.[71] Thus, in *Lebanon Steel Foundry* v. *N. L. R. B.*, 130 F. 2d 404, 407-408 (D. C. Cir. 1942),[72] the Court of Appeals sensibly analyzed the validity of signed cards as indicia of employee's desires:

> The Wagner Act requires no specific form of authority to bargain collectively.[73] It is not a statute of frauds or an act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any special formula or form of words. Authority may be given by action as well as words. An application for union membership implies authority to bargain [citations omitted] * * *. Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as the employees' representative in collective bargaining * * *.

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70. It should be noted that in the instant cases, *Gissel, Heck's* and *General Steel*, the cards are unambiguous, unequivocal authorizations to represent the undersigned employees in respect to wages, hours and other conditions of employment.

71. The Board has pointed to the acceptance of authorization cards "(a) by agreement by the parties voluntarily through unofficial channels, (b) by the American Arbitration Association, and (c) by a majority of the State labor relation agencies" as support for its refusal to hold such authorizations inherently unreliable. *Levi Strauss & Co.*, 172 NLRB No. 57, n. 10, 68 LRRM 1338, n. 10 (1968).

72. Cited by this Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 557 (1956).

73. As discussed *supra*, the language of Section 8(5) of the Wagner Act remains unaltered by the 1947 and 1959 amendments.

> It is only necessary that [intent] be manifested in some manner capable of proof * * *. The agreements or authorizations are laborers' not scriveners' expressions of intention. They are expected to be made in the workingman's manner not in that of management as it conducts corporate affairs, with a lawyer at its side * * *.
>
> The * * * card * * * carries on its face the clear presumption of membership or intention to become a member * * * or authoriz[ation] to the union to bargain collectively for the signer. * * * If evidence can overcome this, it must be strong indeed.

The cards involved in *Lebanon Steel, op. cit.*, were check-off cards, and, as indicated in the above quotation, the issue in that case, whether such cards should be construed as employee designations, was decided in favor of the union. Significantly, the validity of employees' signatures on such authorizations was considered by Congress in enacting the 1947 Taft-Hartley amendments.

Congress was seriously concerned about the effects of payoffs to union representatives on the scheme of obtaining industrial peace through collective bargaining, S. Rep. No. 105 on S. 1126, I Legis. Hist. LMRA 1947, p. 458; 93 Cong. Rec. 4805-4807, 4875-4884 (daily eds. May 7 and 8, 1947), II Legis. Hist. LMRA 1947, pp. 1304-1323; 93 Cong. Rec. 5147 (daily ed. May 12, 1947), II Legis. Hist. LMRA 1947, p. 1498. In Section 302 it declared it unlawful for an employer to pay to and for a union representative to receive from an employer "any money or other thing of value" and imposed upon violators criminal sanctions of "a fine of not more than $10,000.00 or * * * imprisonment of not more than one year, or both." However, it exempted from such prohibitions the payments by employers to union representatives of union dues only where an employee had executed a "written assignment"—a check-off authorization. Section 302(c)(4) (Supp. A. 10-12). Manifestly, Con-

gress considered the signatures of employees of sufficient reliability to render legal what otherwise would be a criminal act.[74] It is significant that in 1959 Congress increased the restrictions on payments to employee representatives, but left untouched the proviso permitting check-offs based on an employee's written authorization. Section 302 (Supp. A. 10-12); S. Rep. No. 187 on S. 155, p. 13, I Legis. Hist. LMRDA 1959, p. 409. And so, as of 1966, signatures of an estimated 16 million American workers[75] granted the right to employers, on the mere strength of such signatures, without any independent proof of employee intent or governmental certification, to deduct moneys from their wages and to make such payments to union representatives.

The value of an employee's signature upon a check-off authorization was enhanced in the 1959 amendments. Section 401(e) (Supp. A. 12-13). In Section 401(e) Congress provided that an employee member of a union could not be deprived of his right to vote or his eligibility for candidacy to union office by reason of "alleged delay or default in the

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74. Senator Taft, explaining the new provision said:

> • • • with regard to check-off,—the amendment provides that it is proper to make such an agreement—provided that the employer has received from each employee,—a written assignment • • •.
>
> So far as the testimony shows, that is the usual form of check-off. Under it the employee himself signs a slip or assignment authorizing the check-off • • •. That, I think is substantially in accord with nine-tenths of all check-off agreements and simply prohibits a check-off made without any consent whatever by the employees.

93 Cong. Rec. 4876 (daily ed. May 8, 1947), II Legis. Hist. LMRA, 1947, p. 1311.

75. The Bureau of Labor Statistics in Chicago has informed the undersigned that as of 1966 there were 19,124,865 workers in the United States covered by union contracts. The Bureau of National Affairs reports that check-off of union dues is provided in 83 per cent of labor contracts (BNA, *Collective Bargaining Negotiations and Contracts,* Section 87.3). The cited figure results from extrapolating these two statistics; no exact information on the number of employees on dues check-off is available.

payment of dues", if he had executed a voluntary check-off authorization.

Moreover, the signing of a check-off authorization has granted an employee protection from discharge under Section 8(a)(3) and Section 8(b)(2) of the Act. Where an employer and a union have signed a union shop agreement consistent with the proviso to Section 8(a)(3), an employee is insulated from discharge and from an attempt by the union to cause his discharge if he has executed a check-off authorization, even where the employer has failed to remit his dues to the union. *Union Starch & Refining Co.*, 87 NLRB 779; *Electric Auto-Lite Co.*, 92 NLRB 1073, affirmed, 196 F. 2d 500 (6 Cir. 1952), certiorari denied, 344 U. S. 823 (1952); *Ferro Stamping & Mfg. Co.*, 93 NLRB 1459. Thus the design of the Act affords additional significance to the rights arising from the affixation of an employee's signature.

Lending further credence to the legislative design which accepts signed authorizations not only as a reliable but an essential element of the labor law are Section 9(c)(1)(A) and Section 9(e). Section 9(c)(1)(A) permits a representation petition and a decertification petition to be processed when each is supported by a "substantial number of employees." Congress in adopting such language accepted the Board's prior practice of insisting upon signatures of 30 per cent of the unit employees on authorizations or petitions. Section 9(e) specifically provides for 30 per cent of the signatures of employees in the bargaining unit to empower the Board to hold a union shop deauthorization election. Since 1947 when Sections 9(c)(1)(A) and 9(e) were passed, the Board has relied on authorizations signed by employees to hold such elections. Although some legislative criticism of such reliance was voiced in 1959, congressional debate on Section 8(b)(7) demonstrates unmistakably that Congress rejected such criticism, accepted

the reliability of authorization cards and, indeed, relied upon their use to achieve "lawful recognition" as an integral part of the design of the Act. 105 Cong. Rec. Sen. 5951, 15121, 16398, 16419 (daily eds. April 24, August 20, 21, September 3, 1959), II Legis. Hist. LMRDA, 1959, pp. 1174 (3), 1361 (1), 1427 (3), 1437 (3); 105 Cong. Rec. House 13087 (daily ed. July 27, 1959), II Legis. Hist. LMRDA, 1959, p. 1518.

In another context, this Court has accepted the reliability of authorization cards and the right of an employer to recognize a union predicated upon a majority of employees' signatures thereon. In *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961), the primary issue involved was the recognition by the employer of a union which had not been designated by a majority of the employees. There, the Court said [366 U. S. at 739-740, 81 S. Ct. at 1608]:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate * * * he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or *authorization cards.* Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. [Emphasis supplied.]

There is no distinction in principle between the obligations of an employer under Section 8 (a) (2) to cross-check authorization cards and the obligation imposed upon him in this respect under Section 8(a)(5).[76] Indeed, to hold that an employer has a right to recognize a union's majority status by virtue of authorization cards to avoid a Board election where the employer prefers such union, and

76. See *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B., op. cit.*

to reject the obligations to recognize a union which tenders a majority of valid, unambiguous authorization cards where the employer abhors the particular union, is to deny the employees the right to select the bargaining agent of their own choosing guaranteed in Section 7 of the Act. Certainly the reliability of authorization cards is not predicated upon an employer's *animus* or favorable inclinations toward unionism generally or an identifiable union in particular.

In view of the long-standing acceptance of authorization cards by this Court, all courts of appeals (including the Fourth Circuit)[77] and the Board, in light of the scheme of the Act according written authorizations a special significance and in view of the legislative history supporting the reliability of such authorizations, the Fourth Circuit's decision in the instant case should be reversed.

Moreover, the very reasons ascribed by the Fourth Circuit for its conclusion that authorization cards are inherently unreliable and that the presentation of such cards to an employer *ipso facto* creates a doubt as to the union's majority designation, reveal the insufficiency of its basis for digressing from the foregoing long line of cases and well established legal principle. First, the Court said: "No thoughtful person has attributed reliability to such card checks."[78] This *ipse dixit* statement constitutes an indictment of this Court,[79] the various courts of appeals,[80] the

77. See, e.g., *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (4 Cir. 1950).

78. *Logan*, 386 F. 2d at 565.

79. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559 (1956); *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961); *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 61 S. Ct. 83 (1940); *N. L. R. B.* v. *Franks Brothers Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944).

80. See *supra*, ns. 26, 27, 53, 58.

Board,[81] members of Congress,[82] the academic community[83] and untold thousands of representatives of labor and management who have engaged in voluntary recognition and collective bargaining.[84]

Second, the Court stated[85] that the Board "fully recognized" the unreliability of authorization cards as a method of designating the employees' collective bargaining representative, citing *Sunbeam Corp.*, 99 NLRB 546, 550-551 (1952); *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945); *Novak Logging Co.*, 119 NLRB 1573 (1958). The

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81. *Joy Silk Mills*, 85 NLRB 1263, enforced, 185 F. 2d 732 (D. C. Cir. 1950), cert. denied, 341 U. S. 914; *Preston Products Co., Inc.*, 158 NLRB 322, enforced, 392 F. 2d 801 (D. C. Cir. 1967), cert. denied, 392 U. S. 906; *Sinclair Co.*, 164 NLRB No. 49, 65 LRRM 1087, enforced, 937 F. 2d 157 (1 Cir. 1968); *Philamon Laboratories Inc.*, 131 NLRB 80, enforced, 298 F. 2d 176 (2 Cir. 1961); *Quality Markets, Inc.*, 160 NLRB 44, enforced, 387 F. 2d 20 (3 Cir. 1967); *Florence Printing Co.*, 145 NLRB 141, enforced, 333 F. 2d 289 (4 Cir. 1964); *Goodyear Tire & Rubber Co.*, 159 NLRB 834, enforced, 394 F. 2d 711 (5 Cir. 1968); *Nelson Mfg. Co.*, 138 NLRB 833, enforced, 326 F. 2d 397 (6 Cir. 1964); *Elliott Williams Co., Inc.*, 143 NLRB 811, enforced, 345 F. 2d 460 (7 Cir. 1965); *Decker, d/b/a Decker Truck Lines*, 128 NLRB 858, enforced, 296 F. 2d 338 (8 Cir. 1961); *Trimfit of California*; 101 NLRB 706, enforced, 211 F. 2d 206 (9 Cir. 1954); *George Grok & Sons*, 141 NLRB 931, enforced, 329 F. 2d 265 (10 Cir. 1964).

82. See *supra*, pp. 24-30, 33-37.

83. E.g., Professor Bok whose article, "The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act," 78 Harv. L. Rev. 38, is liberally cited in the *Logan* decision, 386 F. 2d at ns. 35, 36, 37, appears to be one who attributes reliability to authorization cards. See *ibid.*, at p. 133. Professor Lesnick would appear to come within the Fourth Circuit's "No thoughtful person" characterization. See Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. R. 851, 861, 868, n. 63. See also, Parker, "Labor: Authorization Cards and the National Labor Relations Board," 13 How. L. J. 171, 180.

84. See NLRB, Thirtieth Annual Report, 1965, p. 2; *Levi-Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1342 at n. 10.

85. *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, n. 8 (4 Cir. 1967).

Court made no mention of the fact that each of those cases involved the effect to be given to authorization cards where one of two competing unions was seeking recognition of the employer—a situation where dangers of violations of Section 8(a)(2) are manifest.[86] The difference between a one and two union situation *vis-a-vis* the value of authorization cards is apparent. In a two-union campaign employees desiring collective bargaining representation may sign cards for the first union and then, when given a choice of unions, may thereafter sign cards for a second preferred union. Also in a two-union campaign, under existing Board rules, it is generally known that recognition will not be sought and that an election will be held.[87] Cards signed under these circumstances do not have the same value as in the instant case where the employees were told that the cards would be used to seek recognition. It is therefore a mistake to suggest that, because the Board does not rely on cards in cases where two competing unions have obtained signed authorizations, such cards are unreliable in the instant case where only one union organized the employees. Cf. *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7 Cir. 1954).

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86. In two of the cases cited, i.e., *Sunbeam*, *op. cit.* and *Novak Logging Co.*, *op. cit.*, the Board found that the employer had illegally assisted one of the two competing unions in violation of Section 8(a)(2). In *Midwest Piping & Supply Co.*, 63 NLRB 1060, 1069-1071, 1075-1078, the Board held that the employer assisted a union in violation of Section 8(a)(1), *inter alia*, by entering into a union shop agreement with it at a time when the employer was apprised of another union's conflicting claim of representation and in the face of a representation proceeding then current before the Board. Clearly, the Board in its experience and expertise is justified in differentiating between the use of authorization cards in (1) two-union situations and (2) situations where only one union is involved. *N. L. R. B.* v. *Universal Camera Corp.*, 340 U. S. 373, 71 S. Ct. 456 (1951).

87. See *Midwest Piping & Supply Co., op. cit.; Iowa Beef Packers*, 144 NLRB 615; *Novak Logging Co.*, 119 NLRB 1573.

The Board clearly restated its position in the recent case of *Levi Strauss & Co.*, 172 NLRB No. 57, where it said [68 LRRM at 1342, n. 10]:

> Several commentators and courts recently have improperly attributed to the Board the suggestion that authorization cards are not reliable as an expression of the desire of employees to be represented for purposes of collective bargaining, citing *Sunbeam Corporation*, 99 NLRB 546.
>
> In *Sunbeam Corporation*, the Board said that "authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract *where competing unions are soliciting cards*, because of the duplications which then occur." [Emphasis supplied.] *Sunbeam Corporation*, 99 NLRB 546, 550-551. On several recent occasions, the phrase "notoriously unreliable" has been excised from its limited context of a two-union situation and attributed to the Board as indicative of its attitude towards authorization cards in one-union situations. When so used, the phrase is inaccurate. The full import of the phrase becomes clear when it is read in its limited and intended context, as follows:
>
> > "What is the law with respect to the rights and obligations of an employer whose employees are simultaneously being organized by two or more labor organizations, the condition which confronted Sunbeam in August 1950? [sic.] The doctrine has long obtained without question that the employer must be strictly neutral—he cannot give any form of support to one of the rival unions; if he does he violates Section 8(a)(2) of the Act. As the Court of Appeals for the Seventh Circuit stated in *Harrison Sheet Steel Co.* v. *N. L. R. B.*, 194 F. 2d 407, 'He must maintain a strictly neutral attitude. Especially is this so where the adherence of the employees is being sought by rival labor organizations.' That the making of a contract with a union is the most potent kind of support imaginable cannot be doubted. This Board has

> also long recognized that authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract where competing unions are soliciting cards, because of the duplications which then occur. Thus as the Board said in *Midwest Piping and Supply Company:*
>
> > '. . . it is well known that membership cards obtained during the heat of rival organizing campaigns like those of the respondent's plants do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.' "
>
> The utilization of authorization cards to ascertain majority status not only by this Agency but also (a) by agreement of the parties voluntarily through unofficial channels, (b) by the American Arbitration Association, and (c) by a majority of the State labor relations agencies is a sufficiently common, well-established and well-known practice to cast serious doubt on the sweeping denunciations of such proof.

In view of the foregoing, there can be no doubt that the Court erred when it suggested that the Board "fully recognized" the unreliability of cards.

In addition, the Fourth Circuit's decision that authorization cards are inherently unreliable[88] is predicated upon

88. In *Logan, op. cit.*, the Court had a basis for rejecting the authorization cards because of evidence of coercion. See concurring opinion: *N. L. R. B.* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556 (4 Cir. 1967). In *N. L. R. B.* v. *Preiser Scientific Inc.*, 387 F. 2d 143, the possibility that the Fourth Circuit might limit its *Logan* doctrine to situations involving authorization cards impressed with coercion or misrepresentation loomed large, when it sustained the Board's Section 8(a)(5) order, stating at p. 144: "Particularly, the cards did not have the infirmities we found to render them unre-

such authority as the "AFL-CIO Guidebook for Union Organizers",[89] a 1962 speech by Board Chairman McCullock[90] (sic.) in which he set forth "data indicating some relationship" between the number of cards signed by employees and the number of Board elections won by unions, a law student's conjecture on union authorization cards[91] and its own speculation as to what conceivably might occur in the solicitation of authorization cards.

Vis-a-vis the "AFL-CIO Guidebook for Union Organizers,"[92] it should be noted that a manual written for

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liable under the principles we stated, and now reaffirm, in *Crawford Manufacturing Co., Inc.* v. *N. L. R. B.* (No. 11,040, 4 Cir. decided Oct. 27, 1967); *N. L. R. B.* v. *S. S. Logan Packing Company* (No. 10,355, 4 Cir., decided Oct. 27, 1967)." However, in the instant case and *N. L. R. B.* v. *Heck's, Inc.*, 398 F. 2d 337 (4 Cir. 1968), where there is no serious claim of misconduct in respect to the signing of any cards, it is clear that the Fourth Circuit erroneously has fashioned a rule of law to reject authorization cards as an indicator of employees' union desires, irrespective of the absence of misrepresentation, coercion or taint of any kind.

89. *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d at 565, n. 9.

90. *Ibid.* p. 565.

91. Comment, "Union Authorization Cards," 75 Yale L. J. 805 (1966). Professor Lesnick characterized this Comment as "a diatribe against reliance on authorization cards." Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. Rev. 851.

92. The Fourth Circuit relied upon a report of an excerpted passage of the AFL-CIO "Guidebook for Union Organizers" quoted in Hearings before the Subcommittee on Labor, etc. 89th Cong. 1st Session on S. 256 to Repeal Section 14(b), p. 190, which in turn contains a quotation from the U. S. News & World Report, March 15, 1965, including what appears to be an article by an employer labor attorney. Because of the difficulty in obtaining a copy of such "Guidebook," we have reproduced in the Supplemental Appendix, attached hereto, for the Court's convenience (Supp. A. 39) *in toto* the passage concerning "NLRB PLEDGE CARDS" referred to in such Hearings. We invite the Court to compare the reproduced portion of the "Guidebook" with the statement: "The term 'NLRB Pledge Cards is obviously a misnomer' ", contained in the Hearings before the Subcommittee on Labor, etc., *op. cit.*, p. 190.

internal union purposes would appear to constitute less than overwhelming legal authority. Nevertheless, a brief comment in respect to its misuse may be justified.

Manifestly, cards solicited for an election only do not, and inherently could not, elicit the degree of commitment which motivates a worker to sign a card which he knows (or as to which he is advised, as in the instant case) will be construed as his "official" designation of the union as his bargaining representative. Thus, an employee who would not sign an unambiguous authorization card to be used in a card check, may well sign a card for an election, knowing that in the election booth his anti-union vote will be one that "counts." It is for this precise reason that experienced and knowledgeable organizers will be wary of NLRB pledge cards signed by those who would "get the union off [their] back[s]" in an *election campaign.* The caveat in the AFL-CIO manual is based on experience, and is intended to alert the younger organizers in the field to refrain from relying on inadequate assurances of allegiance in *election campaigns.*[93] Critics of the card check procedure, seizing on this AFL-CIO caveat, conveniently conceal the fact that the entire section of the manual out of which this "semantic plum" has been plucked is a dissertation on pitfalls in an election campaign only.[94]

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93. Compare the type of instructions passed on to organizers in the signing of authorization cards where the object, as in the instant case, is to seek recognition: Schlossberg, Stephen L., *Organizing and the Law,* BNA, 1947, p. 49.

94. All authorities agree that cards signed for an election only (as distinguished from authorization cards) cannot be used to support a refusal to recognize charge under Section 8(a)(5). *Englewood Lumber Company,* 130 NLRB 394; *N. L. R. B.* v. *Koehler,* 328 F. 2d 770 (7 Cir. 1964); see *N. L. R. B.* v. *Cumberland Shoe Corp.,* 351 F. 2d 917; *N. L. R. B.* v. *Winn-Dixie Stores, Inc.,* 341 F. 2d 750 (6 Cir. 1965), certiorari denied, 382 U. S. 380, 86 S. Ct. 69 (1965); *N. L. R. B.* v. *Swan Super Cleaners, Inc.,* 384 F. 2d 609 (6 Cir. 1967). See *Levi Strauss & Co.,* 172 NLRB No. 57, 68 LRRM 1338.

In addition, Chairman McCulloch's speech referred to in the Fourth Circuit's *Logan* decision does not require the conclusion that authorization cards are "seriously unreliable". Indeed, as Judge Sobeloff in his concurring opinion in *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 554-555 (4 Cir. 1967), noted: "the only statistical study of cards, upon which the *Logan* opinion relies heavily, concludes: '[A]uthorization cards do have validity'."

No mathematical analysis can be relevant to the reliability of authorization cards. Experiences are all too frequent that Board election campaigns invite employer unfair labor practices, *General Shoe* interferences with fair election procedures [*General Shoe Corp.*, 77 NLRB 124, enforced, 192 F. 2d 504 (6 Cir. 1951), certiorari denied, 343 U. S. 904, 72 S. Ct. 635 (1952)], long delays which chill the fervor of union adherents and multitudinous other factors which adversely affect the free choice of employees.[95] Nor do the number of unfair labor practice charges or the number of objections to elections adequately illustrate the scope of employer interferences with such employee free choice. Frequently unions fail to file such charges or objections because of futility arising from the inadequacy of Board remedies, the unlikelihood of success in re-run elections (see e.g., Pollitt, NLRB Re-run Elections: A Study, 41 N. Car. L. Rev. 2091 (1963)), Board administrative problems, cost, internal union problems, further loss of prestige, etc.

Chairman McCulloch's figures in the speech cited by the Court came from an unpublished field survey by Professor Ross of the University of Pittsburgh. Ross' study was based on a small[96] sampling of cases in a geographically

95. See *infra*, pp. 55-66.

96. The study concerned only 214 elections held during 1960.

limited area[97] involving no qualitative analysis of its results.[98] Yet such value as can be attributed to the Ross study shows that there is a positive relationship between the number of authorization cards and the likelihood of success in elections, in spite of the dangers of delay, interference, etc., involved in the NLRB representation and election process. See *infra*, pp. 55-66. As Judge Sobeloff said [concurring in *Sehon Stevenson*, 386 F. 2d at 555]:

> The facts of the instant case are instructive. The employer was presented with authorization cards from nearly 70% * * * of the employers in the unit. The statistics relied upon in *Logan* to designate cards point out that when 70% of the employees have signed up, three out of four times the union will be successful in the subsequent election. In addition, in this case there was no allegation of any ambiguity in the cards or any misrepresentation or threat or any of the other abuses so painstakingly catalogued in *Logan*.[99]

Heedless to Judge Sobeloff's persuasive arguments, the Fourth Circuit arrogated unto itself the right to pronounce a sweeping rule of law, not limited to the facts of the case before it, that authorization cards cannot sustain Section 8(a)(5) violations. Under the statutory scheme, however, it is the Board "whose findings within [the] field [of labor law] carry the authority of an expertness which courts do not possess and therefore must respect * * *", and which is commissioned with the formulation of judgments on the basis of its "experience in dealing with a specialized field of knowledge", *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 71 S. Ct. 456 (1951). Thus, since Congress

97. The jurisdiction of the Atlanta Regional Office is all of Georgia, eastern Tennessee and northern Alabama.

98. See McCulloch, Frank W., "A Tale of Two Cities: Or Law in Action", ABA Section on Labor Relations Law, Report of Proceedings, 1962, pp. 14-20.

99. The force of Judge Sobeloff's words fit the instant *Gissel* case "like a glove".

has entrusted the Board with such findings and since with its full experience in respect to authorization cards and petitions under Sections 9(c) and 8(a)(5) [and occasionally Section 302], both before and after Chairman McCulloch's 1962 speech, it has uniformly held that unambiguous authorization cards are reliable indicators of employees' wishes in one-union cases, absent fraud, coercion, misrepresentation or other taint. Neither the meager experience, the legal forensics nor the delusive conjecture and speculation of note writers or courts should be permitted to set aside the Board's conclusion. In sum, the Fourth Circuit's view seems "to be the product of an obsession with the infirmities of authorization cards,[100] and a romanticizing of the validity of an election. Cards have been used under the act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status * * *. No amount of drumbeating should be permitted to overcome, without legislation, this history."[101]

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100. "The proper solution of the problem arising from the possible abuse of this long-established procedure lies in a case-by-case analysis of the use made of the cards and not in their outright repudiation. Evaluation of the reliability of authorization cards should be made in two distinct contexts. One is where there is no election and no employer unfair labor practice other than a refusal to bargain; the other is where there has been an election which is vitiated by an employer violation.

"The first category, illustrated by the instant case, is where the union submits to the employer cards from a majority of employees and demands recognition and collective bargaining. The majority opinion here and the *Logan* opinion indicate that on these facts alone the employer would be justified in refusing to bargain, basing a claim of doubt on the asserted inherent unreliability of cards. This smacks of policy-making by stereotype." Judge Sobeloff (concurring), *N. L. R. B.* v. *Sehon Stevenson Co.*, 386 F. 2d 551, 555 (4 Cir. 1967).

101. Lesnick, Howard, "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. Rev. 851, 861-862.

B. Representation Elections Are Not Necessarily the Most Reliable Indicators of Employees' Desires.

In *Logan*, the Fourth Circuit espoused its view, correlative with its holding on the inherent unreliability of cards, that a representation election under the auspices of the NLRB is the sole method reliably to determine employees' wishes. However, careful analysis of and familiarity with the election processes and the human variables incident thereto belie the validity of the Fourth Circuit's belief.

1. A "Secret Ballot" Is No More Indicative of Employees' Intent Than an Authorization Card.

The *Logan* court noted that cards are unreliable, *inter alia*, because they are "obtained before the employees are exposed to any counter-argument and without an opportunity for reflection or recantation" [386 F. 2d at 566]. This conclusion overlooks the realities of the employer-employee relationship, for whereas the employee is exposed to the union's arguments only during an organizing campaign, he is subjected to daily exposure of the employer's views.[102] From the day he is hired the employee is indoctrinated with management's views of unionization, labor economics and employer prerogative.[103] Thus, numerous studies have demonstrated that long prior to the advent

102. Concommitantly, the union organizer is at an additional handicap because "he must develop a personal relationship of trust over a short period while the management has had a rather extended period in which the workers get to know him." Butler, Donald T., "Factors Affecting Trade Union Organizing Of Manufacturing Firms", p. 131, unpublished doctoral thesis, University of Wisconsin, 1959.

103. E.g., in the instant case, shortly after his hire and more than a year before the Union's organizational campaign commenced, employee Mount was told by Vice President Gissel that the shop was non-union and any employee would be discharged if the Company learned that he even talked to a Union representative (A. 60).

of a union organizational campaign, many employers have imbued employees with an "elemental fear of reprisal" sufficient to forestall any union activity.[104] Moreover, it should be noted that employees are acutely aware that if the union loses the election, it will hold no sway over their economic lives, whereas, if the union wins the employer still maintains his economic life-and-death power over his employees.[105]

Nonetheless, the Fourth Circuit asserts that "exposure of each employee to both sides of the issue" renders the employee's choice "when the ballot is cast—as reasoned and rational as possible", *N. L. R. B.* v. *Logan Packing Co.*, 386 F. 2d at n. 16. However, even full exposure to both the union's and management's propaganda may be totally irrelevant to the employee's decision to designate a union whether by authorization cards or an election. A study of why workers join unions concludes:[106]

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104. See Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act", 78 Harv. L. Rev. 38, 125, and authorities cited therein at n. 238. See also, *Butler, op. cit.* at 136. Case studies conducted by Butler revealed that employer threats remained foremost in employees' memories, whereas recollections of other campaign propaganda faded with the passage of time:

> The workers interviewed made no mention of any economic activities on the part of the organizer though they fairly well agreed that the management was set on keeping the union out and two remembered that he said that he would close the plant if the union came in.

In the instant *Gissel* case the evidence disclosed interference, restraint and coercion practiced in respect to employees more than three months prior to the commencement of the Union's organizing campaign. See *supra*, p. 4. Moreover, Gissel's antiunion attitude had been instilled in many of the same employees in 1960 when the company was found to have violated sections 8(a)(1) and (3). See *Gissel Packing Co.*, NLRB case No. 9-CA-2068 (Supp. A. 14-33).

105. Lesnick, *op. cit.* at n. 64.

106. Seidman, London & Karsh, *Why Workers Join Unions*, Annals, March 1951, pp. 75, 84, cited by Bok, 78 Harv. L. R. at 50.

> Often the decision to join a union is not based on logical reasoning in which self-interest figures to a large degree, but upon expediency—a reaction to the pressures of the moment.

Other studies indicate that the decision to vote for the union is made before the election procedure is invoked and thus pre-election propaganda, whether one- or both-sided, may have little influence on the voter:[107]

> After extensive empirical research, various voting analysts have come to suspect that even if election propaganda is read, it will largely serve to provide rationalizations for decisions already reached on other grounds * * *. As some have observed: "Arguments (read or heard by the voters) enter the final stage of decision more as *indicators* than as *influences*. They *point* out, like signboards along the road, the way to turn in order to reach a destination which is already determined.

Further, Bok suggests that votes "as reasoned and rational as possible"[108] may not result in expression of majority will because few voters are able to appraise evidence sufficiently systematically and rationally in the increasingly complex arena of labor relations and because often the adverse arguments of labor and management will not yield to logical analysis.[109] Accordingly, there is reason to doubt

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107. Bok, 78 Harv. L. R. at 88-89, citing Harlow, *Social Science in Public Relations*, 71 (1957); Lazarfeld, Berelson & Gaudet, *The People's Choice*, p. 83 (1948).

108. *Logan*, 386 F. 2d at n. 16.

109. Bok states [78 Harv. L. R. at n. 34]: "The most conscientious voter may be unable to decide on logical grounds whether the indeterminate possibility of a five cent increase, an expanded health insurance program, and a grievance procedure outweighs the indeterminate chance of a strike or a relocation of the enterprise. Moreover, legal rules will have no meaningful effect unless the questionable campaign tactics are truly capable of affecting the decisions of enough conscientious voters to affect the outcome of the election. And even if these conditions are satisfied, the law will only succeed in causing the election to correspond more

that a ballot cast in an NLRB election is, as asserted by the Fourth Circuit, the result of a free choice, "as reasoned and rational as possible."[110]

Moreover, the instability of NLRB election rules and procedures may render expression of free choice an impossibility. The "law concerning representation elections has had a turbulent history."[111] NLRB election policies change frequently, most markedly with every new Board and thus what may constitute a valid election under the Board's rules on one occasion may be held invalid there-

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closely to the values and preferences of the rational voters. If these voters represent a small minority—as most empirical studies would have us believe—the law may still fail to bring about an election result that will correspond to the values and desires of the majority."

110. It is clear that the employer engages in much conduct which, although of seeming little moment to reviewing tribunals, nonetheless just as seriously interferes with the free choice of employees as do unfair labor practices or other conduct sufficient to set aside an election (see *General Shoe Corp.*, 77 NLRB 124). For example, during a union campaign, when a supervisor has prior thereto said, "Hello," to the employees and ceases such practice, this affects employees' votes. When the supervisor, during the election campaign, stands at an employee's station for a number of minutes or even seconds when it was not his practice to do so theretofore, this affects the employee's "free choice." In such innumerable ways of daily contact the employees are affected in their so-called "free choice" and, accordingly, because of the superior position of the employer his daily and even minute by minute contact with the employees can and does affect the employee's vote to the extent that no "free and fair election" is ever truly possible. It is therefore a rebuttable homily when it is said that an election is a more reliable indicator of employees' wishes than unambiguous authorization cards. See *supra*, pp. 37-54; *infra*, pp. 59-66.

111. Bok, 78 Harv. L. R. at 39 and n. 3:

> • • • some [rules] have enjoyed a particularly checkered career, been born in a period, laid to rest in another only to be resurrected, like the Phoenix, garbed in slightly different plumage • • •.
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> • • • • •
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> The legal doctrine relating to election campaigning under the NLRA has traditionally been referred to as a prime example of instability in labor law • • •.

after.[112] In essence then, the employee's right to have his vote in a valid election certified depends on the viscissitudes of the Board's constantly shifting policies.[113] And thus frequently the election procedure fraught with its inherent uncertainties fails to afford adequate protection to the vote and fails to result in the expression of employees' true intent.[114]

2. Elections Are Susceptible to Misrepresentation and Coercion.

Although the Board supposedly conducts its elections only in so-called "laboratory conditions", "no seasoned observer considers [this objective] realistic." "[E]lection campaigns are characterized by 'prattle rather than precision' [citing *Olson Rug Co.* v. *N. L. R. B.*, 260 F. 2d 255 (7 Cir. 1958)] and exaggerations, name calling, inaccuracies, and, to some extent, deliberate falsehoods [which] are sometimes permitted as usual electioneering devices and campaign tactics."[115]

In addition, much objectionable conduct which interferes with the employee's "free choice" is held by the Board to be insufficient to invalidate an election. For instance, inadvertent misstatement, which under Board law will not void an election,[116] deprives the employee of a free choice just as effectively as a fraudulent misrepresentation. Also, misinformation disseminated more than 24 hours before

112. See generally, Bok, 78 Harv. L. R. 38-45.

113. For example, employer statements to employees emphasizing the futility of selecting the union: *Metropolitan Life Insurance Co.*, 90 NLRB 935 (elections set aside); *National Furniture Mfg. Co., Inc.*, 106 NLRB 1300 (election not set aside); *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (election set aside).

114. Bok, 78 Harv. L. R. at 45.

115. Agabin, "Labor-Elections-Campaign Literature," 3 ALR 3d 889, 894.

116. *Barber Colman Co.*, 116 NLRB 24, *Avon Products, Inc.*, 116 NLRB 1729; see *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 224.

an election may impair the employee's freedom of choice regardless of whether there is ample time for the employees to verify it or for the union to rebut it (the Board's tests for validity).[117] Information concerning the misrepresentation may not be communicated to the union in sufficient time for rebuttal. Employees may not have time or may be reluctant to question the union, or the union may not have sufficient access to the employees, especially close to the date of the election, whereas the employer has almost unlimited access.[118]

Employer speeches and interrogation, even if held lawful by the Board, cannot help but have a disproportionate impact on employees.[119]

While the Fourth Circuit imports great weight to the opportunity afforded by the election process, for employees to hear "both sides of the issue,"[120] misrepresentation, in-

117. *Kennametal, Inc.*, 121 NLRB 410; *Fisher Radio Corp.*, 123 NLRB 879; *Lundy Packing Co.*, 124 NLRB 905.

118. See Bok, 78 Harv. L. R. at 96-103.

119. See Butler, "Factors Affecting Trade Union Organizing of Manufacturing Firms", unpublished doctoral thesis, University of Wisconsin, 1959. Butler analyzed the effect on employees of the law regulating election campaigns as follows [at 122]: "One of the most common statements was from the older organizers who spoke of the effect of the Taft-Hartley Act in giving management the right to propagandize their workers. A few of the people in management who had been faced with union organizing campaigns before the campaign with which the interview was concerned, spoke of the problems under the Wagner Act when a manager could do nothing to give the workers his side of the story. This change in the law and in its interpretation by the National Labor Relations Board has probably aided the firm which does not want to have its plant organized."[12]

[12] From the worker interviews, it is observable that the workers remember and sometimes act upon a statement which is clearly the economic coercion which is forbidden by the Taft-Hartley Act. The legalistic interpretation which relies on semantics allows the intent of the law to be circumvented while the letter of the law is adhered to.

120. *Logan*, 386 F. 2d at n. 16.

timidation and a myriad of other influences too often render such opportunity more destructive than protective of employee rights.

Procedurally, many valid objections to conduct affecting the results of an election are never raised because they come to the union's attention, if at all,[121] after the short period for filing objections has run.[122] Also, many unions fail to file objections because of the expense of litigation,[123] the unlikelihood of success in re-run elections,[124] the potential long administrative delay and the possibility that even if the union gains certification in a re-run election, the employer may refuse to bargain to challenge the certification through a lengthy Board and Court unfair labor practice proceeding. An employer need not articulate his anti-union attitudes to "men who know the consequences of incurring [their] employer's strong displeasure"[125]— knowledge gleaned from daily exposure to management's influence. Even the standards set by the Board to protect employees from coercive interrogation[126] may not adequately safeguard the employee's free choice in an election.

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121. After the union loses an election, employees who had theretofore been supporting the union are at the height of their insecurity and thus are reluctant to come forward with evidence of objectionable employer misconduct. For the same reason unions have difficulties producing evidence in support of post election charges or objections.

122. Within five days of the tally of ballots, Section 102.69, NLRB Rules and Regulations and Statements of Procedure, Series 8, reprinted in the Supplemental Appendix, *infra*, p. 13.

123. In representation cases the union is not usually represented by an NLRB attorney, and rarely is represented by private counsel.

124. See, *e.g.*, Pollitt, "NLRB Re-run Elections: A Study", 41 N. Car. L. R. 2091 (1963).

125. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, 61 S. Ct. 83, 87 (1940); *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 62 S. Ct. 348 (1941).

126. *Struksnes Construction Co.*, 165 NLRB No. 102, 65 LRRM 1385; *Blue Flash Express, Inc.*, 109 NLRB 591; see *Bourne* v. *N. L. R. B.*, 332 F. 2d 47, 58 (2 Cir. 1964).

One commentator discussed the fallibility of these standards [Bok, 78 Harv. L. R. at 109, 108]:

> current standards . . . will not suffice to rule out the existence of coercion; it is quite possible that intimidation will occur even if all, or most of the factors cut in favor of the employer.
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> • • • • • •
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> • • • employees may be somewhat more easily intimidated if top management itself takes the trouble to inquire into their activities • • •.

Nonetheless many elections are upheld despite evidence of employer captive audience speeches and wholesale interrogation on the Board's theory that there is no coercive impact on employees if management gives assurances against reprisal or merely expresses opinion.[127]

Many employer statements held by the Board to be protected by Section 8(c) have persuasive impact on employees inconsistent with free choice, *e.g.*, economically based statements concerning partial or complete plant shut down or expressions of opinion as to economic consequences of selecting a union:[128] strikes, loss of seniority, loss of employer-employee "good will."[129] The Board in evaluating such pre-election conduct balances the employee's right to a "free choice" in a "laboratory election atmosphere" against the employer's right vigorously to argue his side of the issue in accordance with considerations of free speech under Section 8(c). In applying this

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127. *Struksnes Construction Co., op. cit.;* see *Interstate Hosts, Inc.*, 130 NLRB 1614, *Hy-Plains Dressed Beef, Inc.*, 146 NLRB 1253.

128. *Weil-McLain Co.*, 130 NLRB 19; *Fisher Radio Corp.*, 123 NLRB 879; *Seven-Up Bottling Co., Inc.*, 140 NLRB 611; *Carlton Forge Works*, 146 NLRB 750.

129. This is not intended to be an exhaustive compilation of the plethora of conduct in which an employer can engage without invalidating the subsequent election. See, *e.g.*, Bok, 78 Harv. L. R. 38 and Agabin, 3 ALR 3d 892.

test, however, the Board too frequently does not ensure a reasoned and rational vote by failing to restrict pre-election campaigning to legitimate arguments relevant and conducive to the employee's reasoned choice. Almost universally employers utilize the pre-election period not to educate employees, but by planting fear of dire consequences in the minds of employees if the union should win, to prevent unionization of their companies by engaging in conduct inconsistent with employee free choice. In this regard the election procedure is particularly susceptible to employer manipulation to serve not the purposes of the Act, but the ends of the employer.

In many cases the employer ultimately benefits from pre-election misconduct even if it results in the setting aside of the first election and direction of a re-run election. Having implanted fear of reprisal in the minds of employees prior to the first election, the employer need not remind them during the second campaign of the repercussions of voting for the union. Current Board remedies are unable to offset the fear of reprisal implanted earlier by the employer.[130]

If the employer has committed unfair labor practices during the first election campaign, the Board will require the posting of notices before a re-run election can be held. But the posting requirement is often meaningless. The notice is written in legalistic terms, the full impact of which is not easily understood, posted on an often little-read bulletin board, frequently offset by an employer disclaimer of fault, and thus does little or nothing to expunge from the

130. Pollitt, "NLRB Re-run Elections: A Study", 41 N. Car. L. R. 2091 (1963); Note, "The Need for Creative Orders under Section 10(c) of the National Labor Relations Act", 113 U. Pa. L. R. 69; St. Antoine, "A Touchstone for Labor Board Remedies", 14 Wayne L. R. 1039; Subcommittee on NLRB of House Committee on Education and Labor, 87th Cong., 1st Sess., Report on the Administration of the LMRA by the NLRB (Comm. Print. 1961).

minds of employees the anticipation of reprisal for union activity.[131]

Discharge, the employer's ultimate weapon, is used to forestall unionization where the employer fears the union's ultimate success in an election. Since the union's prospects in an election depend significantly upon employee organizing committees, discharge of a few key activists can quash, for fear of similar reprisal, all union activities by employees. In cases where no charge is filed or no complaint issues, discharge is a lethal weapon against the union. For, by discharging a pro-union employee, whether or not it is held to be in violation of Section 8(a)(3),[132] the employer raises in the minds of the remaining employees a spectre of employer reprisal. And that fear, rational or not, prevents a "free choice". The technique of discharging employees without invalidating elections has become increasingly commonplace. Bok described the lengths to which antiunion employers will go to defeat the desires of their employees [78 Harv. L. R. at 132]:

> The discharge has been used with increasing sophistication in recent years. Neutral employees may be dismissed along with union activists to disguise the employer's motive. Particular operations and even product lines may be discontinued, at least temporarily, to ease key union supporters out of the plants. More generally, increasing care has been exercised to develop a variety of plausible reasons for dismissing union members.

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131. See *infra*, n. 133.

132. It cannot be gainsaid that many discharges motivated by employees' union activity are not found to be violations of Section 8(a)(3). The difficulties of obtaining evidence in an anti-union company environment cannot be exaggerated. For example, "cause" for which an employee might not otherwise be discharged, frequently is assigned as the reason for discharge and cannot be rebutted; company knowledge of a particular employee's union activity is hard to come by and even more difficult to prove.

If the employer is found to have violated Section 8(a)(3), the Board will postpone direction of or set aside the election, and require the employer to reinstate the discriminatees. Then, despite the employer's coercive conduct, an election may still be held after posting of notices.[133] There is every reason to doubt that the effects of such unfair labor practices can be expunged sufficiently to permit a "free election."[134] A former NLRB Assistant General Counsel described the lasting effects of discharges on employees.[135]

> The continual and cynical violations of section 8(a)(3) * * * by employers in discharging key union adherents, or known union supporters, have not only a "chilling" but a lethal effect on the organizational efforts of employees. The practical effect of firing a few people is far greater than company speeches, leaflets, letters or films, and demonstrates, far more clearly than any words, the awesome power of the employer over the lives of his employees. Besides this, the power and authority of the Federal Government appears remote and ineffectual.

Thus, although the election procedure theoretically allows exposure of employees to "both sides of the issue", it also exposes them to employer coercion, intimidation and discharge. The opportunities for such employer misconduct are a part of the election process. The historical

133. Even if the discriminatees are ultimately ordered reinstated after the long process of an unfair labor practice hearing and court enforcement proceedings, the employee complement is normally sufficiently altered and the object lesson of the "trouble" a union adherent must accept is not unnoticed by the old and new employees, so that the opportunity for a free uncoerced vote thereafter is virtually non-existent.

134. See O'Hara, James and Pollitt, Daniel, "Section 8(a)(3) of the Labor Act: Problems And Legislative Proposals," 14 Wayne L. R. 1104.

135. Hearings on H. R. 11725 before the Special Subcommittee on Labor of the House Committee on Education and Labor (letter of George F. McInerny), 90th Cong., 1st Sess., p. 459 (1967).

instability of election rules and the myriads of possible abuses of the election processes render it difficult, if not impossible, to justify the Fourth Circuit's sanctification and "romanticizing" of NLRB elections.

As we have shown (*supra*, pp. 37-54), signatures on unambiguous authorization cards properly have been recognized by Congress and the judiciary as presumptively valid and reliable indicia of employees' intent. In view of this historical acceptance of cards and the essential instability and potential abuses in the election procedure prejudicial to the exercise of "free choice", it is clear that unequivocal authorization cards are at least equally, if not more indicative of the employees' choice of bargaining representative.

III.

THE FOURTH CIRCUIT ERRED IN FAILING TO ENFORCE THE BOARD'S ORDER TO BARGAIN.

A. The Operative Facts Require That an Order to Bargain, Upon Request, Be Issued Against the Company.

Gissel is a classic case of a refusal to recognize violation of Section 8(a)(5). Here there is evidence that the Company was sensitive to any favorable talk about a union and that the Company engaged in illegal interrogation and threat of discharge on suspicion of any such activity, even prior to the initiation of the union's organizing campaign (A. 263; 60-61, 93-94). When the Union did commence organizing, it used an unambiguous designation which authorized the Union to represent the signer in collective bargaining concerning wages, hours and working conditions (A. 264; 241). In the solicitation of employee signatures, no misrepresentation or coercion of any kind was engaged in; no mention of the potentiality of an election was ever made; indeed, employees were told that the authoriza-

tions would be presented by the Union to the Employer to achieve recognition and bargaining (A. 56). Thus, it is clear that *Gissel* is not a case involving the problems of a dual card, a tainted card, or cards signed under false or misleading impression.[136]

The unfair labor practices evident during the period while cards were being solicited, e.g. the Company vice president's coercive comment to a group of employees (A. 270; 134), reached a crescendo of restraint and coercion practiced upon its employees by the Company, after the Union in late January presented its bargaining demand and offered to prove its majority status by submitting its signed authorization cards to the Company. Gissel refused recognition, *inter alia,* advising the Union to file for a Board election (*supra,* p. 5, *infra,* pp. 70-77), while orchestrating its medley of unfair labor practices to render a free election impossible. Thus, in February the Employer engaged in at least eight separate violations of Section 8(a)(1) of the Act, involving a minimum of seven named[137] employees and an unspecified group of others. The February unfair labor practices included interrogation of employees about their union activities and those of other fellow employees, inquiry concerning the identity of the leading employee Union adherent, invitation to spy on the Union and other employees, a promise of benefit, threats of discharge, questioning about potential strike activity and threats of plant abandonment (A. 268-270; 62, 94-96, 102-104, 111-112, 134, 141). In March and April the Company compounded its unfair labor prac-

136. E. g. *International Union of Electrical, etc. Workers* [S. N. C. Mfg. Co.] v. *N. L. R. B.*, 352 F. 2d 361 (D. C. Cir. 1965), certiorari denied, 382 U. S. 902, 86 S. Ct. 235 (1965); *N. L. R. B.* v. *Peterson Brothers, Inc.*, 342 F. 2d 221, 225 (5 Cir. 1965); *N. L. R. B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917 (6 Cir. 1965); *Crawford Mfg. Co., Inc.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028, 88 S. Ct. 1408 (1968); *N. L. R. B.* v. *Gorbea, Perez & Morell,* 300 F. 2d 886 (1 Cir. 1962).

137. Burchell, Frye, Kidd, Maynard, Moore, Mount and Watts.

tice course of conduct by adding the discriminatory discharge of the two suspected employee leaders of the Union[138] and five additional violations of Section 8(a)(1) involving further interrogation of employees and participation in surveillance of a Union meeting (A. 258-260, 268-269, 271-274, 283-286; 63-65, 67-68, 89-90, 93, 103-104, 235, 237-249). In all NLRB proceedings the unfair labor practices found are like the visible portion of an iceberg, because [to paraphrase the Fourth Circuit in *Logan* (386 F. 2d at 567)]: "If threats were employed ineffectively upon * * * [some employees] there is a natural inference that they were effectively used [on] * * * others with lower powers of resistance, and those intimidated by the [Employer] threats are not likely to go babbling about it to the * * * [Union]".

In view of the foregoing unfair labor course of conduct of the employer,[139] and since the Union had tendered a

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138. It is incongruous, indeed, that the Fourth Circuit holds that "'[f]ew employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed[; w]hether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it,'" [*Logan, op. cit.*] and sanguinely considers the actual discharge of union adherents as of such small moment as not to relate to the alleged good faith of the employer in refusing to recognize their union representative. *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968); *Crawford Mfg. Co., Inc.* v. *N. L. R. B., op. cit.*, *N. L. R. B.* v. *Gissel Packing Co.*, 398 F. 2d 336 (4 Cir. 1968); see *N. L. R. B.* v. *Sehon Stevenson Co., Inc.*, 386 F. 2d 551 (4 Cir. 1967).

139. No attempt shall be made in this brief to respond to the *Logan* argument that unfair labor practices prove an employer's good faith doubt of the Union's majority status. First, the undersigned reasonably anticipates that this matter will be fully and adequately explored in the brief of the National Labor Relations Board; second, the plethora of cases cited *supra*, hold antithetically, and third, on the basis of the argument herein we believe the Board's order to bargain should be enforced, even assuming *arguendo* the good faith of the employer.

majority of valid unambiguous authorization cards when it requested recognition, the Board was compelled to find that the Employer in refusing to recognize the Union had violated Section 8(a)(5) of the Act and to order it to bargain with the Union, upon request, to effectuate the policies of the Act. *N. L. R. B.* v. *Bradford Dyeing Ass'n.*, 301 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct. 397 (1942); *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8 (1 Cir. 1951); *N. L. R. B.* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769 (1 Cir. 1952); *N. L. R. B.* v. *Taitel*, 261 F. 2d 1 (7 Cir. 1958); *N. L. R. B.* v. *Mid-West Towel & Linen Service Inc.*, 339 F. 2d 958 (7 Cir. 1964); *N. L. R. B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468 (7th Cir. 1964); *N. L. R. B.* v. *Crean*, 326 F. 2d 391 (7 Cir. 1964); *N. L. R. B.* v. *Elliot-Williams Co., Inc.*, 345 F. 2d 460 (7 Cir. 1965), *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (9 Cir. 1953), affirmed, 346 U. S. 482, 74 S. Ct. 214 (1953); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206 (9 Cir. 1954); *N. L. R. B.* v. *Geigy Co., Inc.*, 211 F. 2d 553 (9 Cir. 1954), certiorari denied, 348 U. S. 821, 75 S. Ct. 33 (1954); *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, certiorari denied, 348 U. S. 829, 76 S. Ct. 51 (1954); *N. L. R. B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (9 Cir. 1956); see especially, Bok, "The Regulation of Campaign Tactics in Representation Elections Under the NLRA", 78 Harv. L. R. at 132-140.

B. The Company's Defenses Are Insufficient to Rebut Its Duty to Recognize the Union.

1. The Failure to File an Employer Petition.

None of the reasons for refusing to recognize the Union professed by the Company derogates from the foregoing conclusion. Four days after the initial request to bargain, the Company sent a letter declining to grant the Union recognition. *Inter alia,* it asserted (contrary to fact) that the Union did not represent a majority of its employees and suggested that the Union file a petition with the National Labor Relations Board "to hold a fair and honest election, giving our employees the right to express their opinion as provided for in Section 7 of the Act, and their choice could be made in an appropriate bargaining unit in a fairly held election" (A. 234); simultaneously, however, the Company engaged in the course of conduct hereinabove described, to interfere with the employee's free choice, rendering impossible "a fair and honest election", to hedge against the possibility that the Union might file a petition. Significantly, the Employer did not file a petition to ascertain the truth of the Union's claim to majority status nor did he agree to view the authorization cards tendered by the Union (A. 288). These two facts, standing alone, prove that the Employer was convinced that the Union represented a majority of his employees.

"[I]f the company had any doubts [of the union's majority status] when it was approached by the union, it could have agreed to the private election suggested by the union or it could have itself petitioned the Board under Section 9(c)(1)(B) for a representation election. Refusing to pursue either course it acted at its peril" [*Florence Printing Co.* v. *N. L. R. B.*, 338 F. 2d 289, 292 (4 Cir. 1964)]; accord: *N. L. R. B.* v. *Elliot Williams Co.*, 345 F. 2d 460 (7 Cir.

1965); see *N. L. R. B.* v. *Remington Rand Inc.*, 94 F. 2d 862, 869 (2 Cir. 1938), certiorari denied, 304 U. S. 576, 585, 58 S. Ct. 7046 (1938)]. In *N. L. R. B.* v. *Overnite Transportation Company*,[140] 308 F. 2d 279 (4 Cir. 1962), the Fourth Circuit said [at 283]:

> If the company * * * sincerely doubted the union's majority status, it could have challenged the union to substantiate its claims by checking the union cards against the payroll or by requesting the Labor Board to hold a representation election as is its right under section 9(c)(1)(B) of the Act, 29 U. S. C. A. § 159(c)(1)(B) (1956). But the company may not now claim that it has a right to such an election after having first attempted to defeat the union by means of conduct violative of sections 8(a)(1) and 8(a)(3). Such a rule would encourage employers to commit unfair labor practices rather than promote the freedom of employees to decide for or against a union in an atmosphere free from restraint or coercion.

The Court's pre-*Logan* interpretation of the effect of Section 9(c)(1)(B) upon Section 8(a)(5) is manifestly correct[141], inasmuch as that section was designed to afford an employer who doubts a union's majority status the right to have the Board determine whether the union does in fact represent a majority of its workers.[142] Section

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140. Both *Florence Printing, op. cit.*, and *Overnite Transportation, op. cit.* are pre-*Logan* cases. No observable change in the law or Congressional intent has rendered the words of the Fourth Circuit prior to *Logan* less true today.

141. It should be noted that the right to designate a bargaining representative and to be represented in collective bargaining is a right granted to the employees. This statutory right cannot be extinguished by the naked assertion of an employer that a majority of his employees have not designated a union to represent them, when indeed they had.

142. Senator Taft, in respect to the employer petition, said: "Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees' * * *. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I

9(c)(1)(B) also provides a means to an employer to avoid illegally recognizing a union which does not in fact represent a majority of his employees. Thus, when Congress in 1947 granted to an employer the right to file a petition for an election it accorded him safe passage between the Scylla of a violation of Section 8(a)(2) and the Charybdis of a violation of Section 8(a)(5) when he is confronted with a request for recognition predicated upon a claimed authorization card majority. *Cf. United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72, n. 8, 76 S. Ct. 559, 565, n. 8 (1956) with *International Ladies' Garment Workers* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, 81 S. Ct. 1603, 1607-1608 (1961). It thereby granted an expeditious election option[143] to the employer who

want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3954 (daily ed. April 23, 1947), II Legis. Hist. LMRA, 1947, p. 1013. Another strong proponent of the Taft-Hartley Act, Senator Ball, in reference to Section 9(c)(1)(B), said: "One such right [given to employers] is the right to petition the National Labor Relations Board for an election to determine the bargaining representative of an employer's workers, whenever one or more unions present to the employer a demand for recognition as representing the employees * * *. [W]hen he is presented by a union with a demand for recognition, I think the employer is also entitled to know, through the secret ballot provided by the bill, whether the union really represents and is the choice of the majority of his employees." 93 Cong. Rec. 5146 (daily ed. May 12, 1947), *ibid.* p. 1496. At another point Senator Ball entered remarks of Senator Taft in the record, including: "The President objects to an employer having the right to ask for an election when someone claims to be a representative of his men. Surely, an employer ought to have the right to find out whether the union leader really has organized his men, or hasn't." 93 Cong. Rec. A 3232, *ibid.* p. 1627.

143. The limited right to file an RM (employer) petition does not insulate a Company from a Section 8(a)(5) violation where it seeks delay or engages in other unfair labor practices, since such tactics would be inconsistent with a desire on the part of the employer to learn "who is the bargaining agent for my employees" [Senator Taft, 93 Cong. Rec. 3954 (daily ed. April 23, 1947), II Legis. Hist. LMRA, 1947, p. 1013]. Nor does the right to file an RM petition create a right to impede the quick holding of an election by demanding that the union file an RC petition where, under the Board's rules, employer prospects of intruding procedural stumbling blocks are improved.

chooses to avoid the obligation to take "reasonable steps to verify union claims • • • [to] ascertain their validity • • • by cross-checking • • • well-analyzed employer records with union listings or authorization cards. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 739-740, 81 S. Ct. 1603, 1608 (1961), see also *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 73, 71-75, n. 8, 76 S. Ct. 559, 564-566, n. 8 (1956).

Where an employer rejects a union's request for recognition, refuses to check the authorization cards and fails to file an RM petition, as it did in the instant case, the Board should infer company knowledge of the Union's majority status. *Retail Clerks Union, Local No. 1179* [*John P. Serpa, Inc.*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967). Under these circumstances such rejection of the employees' designated bargaining representative violates Section 8(a)(5) of the Act. *Retail Clerks Union Local No. 1179, etc., op. cit.; N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 284 (4 Cir. 1962); *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756 (2 Cir. 1940); *N. L. R. B.* v. *Elliott Williams Co.*, 345 F. 2d 460 (7 Cir. 1965). The principle involved in *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96, 75 S. Ct. 176 (1954), supports the above conclusion.

In *Ray Brooks, op. cit.*, this Court held that the existence of Section 9(c)(1)(B) imposed an obligation on the employer to refrain from refusing to recognize the incumbent union until he exercised the right to petition the Board for an election, albeit the employer had a valid basis for be-

lieving that his employees had deserted the union.[144] There, the Court said [348 U. S. at 103, 75 S. Ct. at 181]:

> If an employer had doubts about his duty to continue bargaining it is his responsibility to petition the Board for relief * * *. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end [industrial peace], it is inimical to it.

The instant case is *a fortiori* to *Ray Brooks, op. cit.*, inasmuch as Gissel's refusal to recognize the Union did not seek "to vindicate the rights of his employees to select their bargaining representative" [*Ray Brooks, etc.*, 348 U. S. at 103, 75 S. Ct. at 181]. Indeed, Gissel's action was in contravention of such employees' rights. If Gissel doubted "his duty to [commence] bargaining, it [was] his responsibility to petition the Board for relief" or to challenge "the Union to substantiate its claims by checking the Union cards against the payroll". *Ray Brooks* v. *N. L. R. B., op. cit.; N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 284 (4 Cir 1962); *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961). Having failed to do either, Gissel violated Section 8(a)(5) of the Act.

Moreover, the rationale of the Court, in the instant case, following *Logan*, misconstrues the statutory mandate regulating the determination of the existence of and the resolution of a question concerning representation. Under the Court's rationale, where, as here, an employer rejects a request for recognition, refuses to check the authorization cards and fails to file an RM petition (cf. *Retail Clerks Local 1179* [*John P. Serpa*] v. *N. L. R. B.*, 376 F. 2d 186 (9

144. *Ray Brooks, op. cit.*, involved a violation of Section 8(a)(5) where an employer refused to bargain with a union which had won an NLRB election and where a majority of the employees a week later advised the employer that they did not wish to be represented by the union.

Cir. 1967), the employer would, nevertheless, be immune from any obligation to bargain with the Union because, the employer's alleged doubt, . . . "dependent upon a choice of dubious or debatable inferences" gives rise to "a question concerning representation". *Logan*, 386 F. 2d at 569.

However, under the Taft-Hartley Section 9(c) provisions, *no question concerning representation can be recognized as existent until and unless the Board investigates and makes such a finding*; i. e. "if it has reasonable cause to believe that a question of representation * * * exists"—after a petition has been filed. An employer confronted with a union demand for recognition based on employee authorization cards cannot arrogate the Board's exclusive power to determine whether there is a question concerning representation which would necessitate an election. Therefore, in the absence of a petition,[145] the employer cannot refuse recognition because he believes there is a question concerning representation. If he so believes, the statutory scheme in 9(c)(1)(B) of Taft-Hartley, as explained by Senator Taft, affords him an opportunity to file a petition in which the Board, alone, can resolve that "question".

2. Shotgun Pretexts.

The other reasons for refusing to recognize the Union asserted in the Employer's letter of January 26, 1965, constitute a scatter shot of excuses in an effort to find some defensible basis within the purview of the Board and court exceptions to avoid the employer's duty to recognize. The Board properly rejected each of the reasons. At the hearing not a scintilla of evidence was adduced to show that the

145. "*Wherever a petition shall have been filed* * * * by an employee or group of employees or any individual or labor organization * * * or by an employer, * * * the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing * * *. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election * * *".

Union in obtaining a majority of signed authorization cards had engaged in any misrepresentation or used "any means or representations [in]compatible with the free exercise of an employee's choice" (A. 233; 288). The reliance on an election four years earlier, held after the employer had admitted its guilt in violating Section 8(a)(1) of the Act, was a transparent camouflage, since the Company stated that it did not believe there had been any change in opinion of their employees and yet engaged in illegal interrogation concerning Union activities in September 1964 and January 1965, prior to the sending of such letter.[146] The claim that the unit was unclear and inappropriate was another red herring, particularly in view of the identity of the requested unit with the unit determination in the former election which, as noted above, the Company interposed among its several pretexts. Moreover, the Board, following its usual procedure, properly held "that 'even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal to bargain charge where the unit is proper' ", citing the Fourth Circuit's decision in *Florence Printing Company* v. *N. L. R. B.*, 333 F. 2d 289, 291 (A. 291, n. 41).

The foregoing proves that Gissel had no valid reason for refusing to recognize the Union and, in the language of the Board, was devoid of a "good faith doubt" concerning the Union's majority status. Without question, Gissel's conduct was violative of Section 8(a)(5) and the Board's bargaining order should be enforced. *N. L. R. B.* v. *Bradford*

146. The Company's evidence that its representatives "decided that maybe they [the Union] might not have a majority" because it lost an NLRB election four years earlier constitutes a function of wish rather than conviction. In addition, the Board properly found, that the Company's position was inconsistent with the frequently exercised right of employees to change their minds. The Board also noted that a similar argument had been rejected by the Fourth Circuit in *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962).

Dyeing Association, 301 U. S. 318, 339-340, 60 S. Ct. 918, 929 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct. 397 (1942); *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, 703-706, 64 S. Ct. 817, 818-819 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 687, 64 S. Ct. 830, 835 (1944).

The question of "good faith" as an element of a violation of Section 8(a)(5) is essential to the proper interpretation of the fulfillment of an employer's duty to *negotiate*, but it has no relevant application to an employer's duty to *recognize*, as we show below. Accordingly, even assuming *arguendo* that the employer had a good faith doubt concerning the Union's majority designation, his refusal to recognize under the circumstances of the instant case nevertheless would constitute a violation of Section 8(a)(5), inasmuch as the Company refrained from checking the tendered authorization cards and refrained from filing a petition for an election under Section 9(c)(1)(B), see cases cited *supra*, pp. 70-71, 73.

C. The Good Faith of an Employer Is Not Relevant to His Duty to Recognize the Bargaining Representative Designated by a Majority of His Employees.

As noted above, the imposition on an employer of a duty to recognize the majority representative of his employees constitutes one of the primary purposes of Congress in passing the National Labor Relations Act, a purpose which has remained unsullied through its various amendments. In respect to the various phases of the duty to recognize, other than majority status supported by authorization cards, the Board and the courts have made it unmistakably clear that "good faith" is totally irrelevant. Thus it has been held

that an employer acts at his peril when he mistakenly, albeit in good faith, refuses to recognize the union because he believes the unit description to be improper.[147] This rule has been extended by the Board to cases where the union's unit description in its request to bargain was unclear, and, indeed, where it varied in some degree from the unit ultimately found to be appropriate.[148]

Significantly, the Board and the courts have rejected good faith as a defense to a Section 8(a)(5) violation where an employer has refused to recognize a union based on an erroneous but genuine belief that such union's majority was established by an invalid election. *Cone Bros. Contracting Company* v. *N. L. R. B.*, 235 F. 2d 37 (5 Cir. 1956); *Rockwell Manufacturing Co.* [*Kearney Div.*] v. *N. L. R. B.*, 330 F. 2d 795 (7 Cir. 1964), cf. dissent of Judge Swygert at 798-800, certiorari denied, 379 U. S. 890, 85 S. Ct. 161 (7 Cir. 1964); *Follett Corporation* v. *N. L. R. B.*, 397 F. 2d 91 (7 Cir. 1968). In *Cone Bros. Contracting Company* v. *N. L. R. B.*, 235 F. 2d at 41, the Court said: "The refusal to bargain was asserted in the genuine belief that the election was invalid, but, as we have held, this mistaken belief does

147. *United Aircraft Corporation* v. *N. L. R. B.*, 333 F. 2d 819, 833 (2 Cir. 1964), certiorari denied, 380 U. S. 910; *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291 (4 Cir. 1964); *Northern Virginia Steel Corp.* v. *N. L. R. B.*, 300 F. 2d 168, 175 (4 Cir. 1962); *N. L. R. B.* v. *Economy Food Center Inc.*, 333 F. 2d 468 (7 Cir. 1964); *N. L. R. B.* v. *Primrose Super Market of Salem, Inc.*, 353 F. 2d 675 (1 Cir. 1965); *Retail, Wholesale & Department Store Union* v. *N. L. R. B.*, 385 F. 2d 301, 308 (D. C. Cir. 1967).

148. *Heck's Inc.*, 156 NLRB 760, 767, enforcement denied on other grounds, 386 F. 2d 317 (4 Cir. 1967); *Ash Market and Gasoline*, 130 NLRB 641; *Hamilton Plastic Molding Co.*, 135 NLRB 371, 373, modified on other grounds, 312 F. 2d 723 (6 Cir. 1964); *Edward Fields, Incorporated*, 141 NLRB 1182, 1195, modified on other grounds, 325 F. 2d 754 (2 Cir. 1963); *Sabine Vending Co., Inc.*, 147 NLRB 1010, 1011, enforced, 355 F. 2d 932 (5 Cir. 1966); *Dixie Color Printing Corp.*, 156 NLRB 1431, 1432, enforced, 371 F. 2d 347, 348 (D. C. Cir. 1966); *Post Houses, Inc.*, 161 NLRB 1159, 1160, n. 1, enforced, 384 F. 2d 463 (3 Cir. 1967).

not, cannot, excuse the Employer from the consequences of this basic violation of the Act."

Thus, the mental attitude of the employer is not relevant to either of the basic elements of his duty to recognize, i. e. the appropriate unit or majority status. It is thereby difficult to perceive by what legerdemain the good faith state of mind of the employer becomes a valid defense to a violation of the duty to recognize where the union's majority status is proved by means other than an election.

In practical terms it is the issue of "good faith" that in large part has created difficulty in respect to refusal to recognize Section 8(a)(5) violations. The Board, the courts and the legal writers, without benefit of psychoanalysis or psychiatric tools, the science of cybernetics or subliminal testing, vainly have sought to delve into the cerebrations of an employer to determine whether a refusal to recognize was predicated upon a "good faith" doubt as to the majority status of the union. Some have suggested that the test should be based upon whether the employer rejects the principle of collective bargaining or whether he seeks undue delay to gain time in which to undermine the union. *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950); certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *Aaron Brothers Co.*, 158 NLRB 1077; *Retail Clerks Union, Local No. 1179* [*John P. Serpa Inc.*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967). Others have suggested that the test should be whether the conduct of the employer has been of such a character as to render a free election impossible and, therefore, that the Board should order the employer to recognize the union upon authorization card designations because of the impossibility of remedying the improperly influenced states of mind of the employees. *Irving Air Chute Co., Inc.*, 147 NLRB 627, enforced, 350 F. 2d 176, 182 (2 Cir. 1965); *Heck's Inc.*, 172 NLRB 255, 69 LRRM 1177; see Lesnick, *op. cit.* None of these tests has worked. In each

case the test is incapable of objective analysis and thereby dependent on the view of the decision-making body, be it a trial examiner, the Board, or a reviewing court of appeals. Further attempts to substitute different word combinations or categories to justify a "good faith" violation of the employees' right to designate their bargaining representative by means of authorization cards will merely exaggerate the logorrhea in this area.

Indeed, at least one court, toying with the question of good faith, shifted to the shoulders of the General Counsel the burden of proving that the employer was in "bad faith" in refusing to recognize the bargaining representative designated by a majority of his employees, and held further, that to prove such bad faith, the General Counsel must prove the negative of a state of mind. *Textile Workers Union* [*Hercules Packing Corp.*] v. *N. L. R. B.*; 386 F. 2d 790 (2 Cir. 1967). Lost in the shuffle is the purpose of the Act, to grant full freedom to employees to organize and to designate a bargaining agent of their own choosing, and the explicit legislative mandate in Section 7, 9(a) and 8(a)(5). Nowhere is there a satisfactory explanation of why the rights of the employees, a majority of whom have selected a union to represent them, should be subordinated to the so-called "good faith" of the employer—and only in authorization majority cases.[149]

149. The genesis of "good faith" is instructive. The term was first introduced into the lexicon of Section 8(a)(5) in respect to the *duty to negotiate*, to avoid its emasculation if an employer were permitted to sit and meet with a mind hermetically sealed against arriving at a collective bargaining agreement. *Atlantic Refining Co.*, 1 NLRB 359, 368; *International Filter Co.*, 1 NLRB 489, 498; *S. L. Allen & Co., Inc.*, 1 NLRB 714, 727-728. However, it was sometime later that the matter of good faith was applied to the *duty to recognize*. Initially, the concept of good faith was introduced in a two-union situation where both unions claimed to have been designated by a majority of the employer's employees. *Brewer-Titchener Corp.*, 19 NLRB 160, 167-168; *American Products, Inc.*, 34 NLRB 442, 449-450; *Bradford Machine Tool Co.*, 44

This Court has considered and rejected the relevance of an employer's good faith to proof of majority status by authorization cards, in another context. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740; 81 S. Ct. 1603, 1607-1608 (1961). In *Bernhard-Altmann, op. cit.*, the employer was held to have violated Section 8(a)(2) when he, in good faith but erroneously, recognized the union as the majority representative of his employees. No difference in principle exists between the duty of an employer to recognize a union designated by a valid majority of its employees and the obligation under Section 8(a)(2) to refrain from recognizing one which has not been so designated, since in both instances, the Section 7 rights of the employees must be protected.

The relationship between Section 8(a)(2) and Section 8(a)(5) was vigorously urged by the petitioning union in *Bernhard-Altmann, op. cit.* as a basis for reversing the Board's finding of a violation of Section 8(a)(2).[150] The petitioner there argued that a violation of Section 8(a)(2) should not exist where an employer erred in recognizing a union which in good faith it believed had been designated by a majority of its employees. The Union predicated this position on the theory that an employer who had a good faith doubt in respect to a union's majority status may, with impunity, refuse to recognize a majority representative without violating Section 8(a)(5). In re-

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NLRB 759, 767, n. 6. The Board held, under the Wagner Act, that the employer might refuse to recognize both unions if he had a good faith doubt in respect to which of the two unions was validly designated by a majority of his employees. *Sbicca, Inc.*, 30 NLRB 60. Later, without rational analysis, the same principle was applied to a one-union situation. *Roanoke Public Warehouse*, 72 NLRB 1281.

150. Brief for Petitioner [ILGWU] at 31-34, *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961).

jecting the union's argument, this Court said [366 U. S. at 739-740, 81 S. Ct. at 1608-1609]:

> We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices [which] are involved. * * * Here that [employer] support is an accomplished fact. More need not be shown for, even if mistakenly, the employees' rights have been invaded. It follows that *prohibited conduct cannot be excused by a showing of good faith.*
>
> This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. * * * We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. *Assuming that an employer in good faith* accepts or *rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding.*[13] *If he is found to have erred in* extending or *withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act* * * *. No further penalty results. [Emphasis supplied.]

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13. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." [Citation omitted.]

The foregoing quotation considered in the light of the vigorous argument based on a Section 8(a)(5) good faith defense made by the petitioner therein reflects the agreement of this Court with that petitioner's contention that good faith as a defense be treated identically in cases involving violations of Section 8(a)(2) and violations of Section 8(a)(5). The Court, however, properly concluded that conduct prohibited by Section 8(a)(2) or Section 8(a)(5)

"cannot be excused by a showing of good faith." In the instant case it is difficult "to see any onerous burden" in "giving the [Gissel] employee only the protection assured him by the Act" by requiring the Company to cross-check "well-analyzed employer records with * * * authorization cards." "Assuming that an employer [Gissel] in good faith * * * reject[ed] a union [Local 347] claim of majority status" and, as herein found, erred in "withholding recognition, he is subject only to a remedial order" to bargain with the Union, upon request.[151]

Inasmuch as the employer's "good faith" is not relevant to his doubts about the appropriateness of the unit nor to his genuine and reasonable doubts about the validity of an election in cases involving violations of Section 8(a)(5), and since his "good faith", but mistaken, belief that a union has been designated by a majority is no defense to a violation of Section 8(a)(2) [*Bernhard-Altmann op. cit.*], there is no basis for a ruling that such a "good faith", but mistaken, belief that the union has not been designated by a majority of authorization cards is a valid defense to a Section 8(a)(5) violation, particularly in view of the right granted to an employer in Section 9(c)(1)(B) to file a petition for an election to resolve his legitimate doubts.

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151. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 739, 740, 81 S. Ct. 1603, 1608 (1961).

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the decision below be reversed with directions to enter a decree enforcing the Board's order.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Secs. 151 *et seq.*) are as follows:*

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth

* The text of the Wagner Act as amended by the Taft-Hartley Act of 1947 is printed in Roman type. Matter added by the Landrum-Griffin Act of 1959 is in italics. Matter deleted in 1959 appears in brackets.

day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with Section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4) *(i)* to engage in, or to induce or encourage [the employees of any employer] *any individual employed*

by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization [or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;] *or to enter into any agreement which is prohibited by section 8(e);*

(B) forcing or requiring any [any employer or other] person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if

another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:*

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an

object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual

employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * * *

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recog-

nized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees [on strike] *engaged in an economic strike* who are not entitled to reinstatement shall [not] be eligible to vote *under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.* In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * *

SEC. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated

with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), *or section 8(e) or section 8(b)(7)* the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except of like character * * * If, after such investigation, the * * * regional attorney * * * has reasonable cause to believe such charge is true and that a complaint should issue, he shall, * * * petition any United States district court * * * for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * [.]: *Provided further,*

That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

SEC. 302. (a) It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend,* or deliver, or agree to pay, *lend,* or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]; *or*

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) *(1)* It shall be unlawful for any [representative of any employees who are employed in an industry affecting commerce] *person to request, demand,* receive, or accept, or [to] *agree to receive or accept,* [from the employer of such employees] *any payment, loan, or delivery of* any money or other thing of value [.] *prohibited by subsection (a).*

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) [with] *in* respect to any money or other thing of value payable by an employer to any [representative who is an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;] *of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer;* (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment

of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; [or] (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents):

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

SEC. 401. (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, dis-

cipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement, shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8.

SEC. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) • • • Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

IR-196
Huntington, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

GISSEL PACKING COMPANY
and
FOOD STORE EMPLOYEES UNION, LOCAL No. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO. } Case No. 9-CA-2068.

Mr. Michael A. Lasher, for the General Counsel.

Greene, Morgan and Ketchum, by *Mr. Edward H. Greene,* of Huntington, W. Va., for the Respondent.

Mr. Jack Brooks, of Charleston, W. Va., for the Charging Party.

Before: *Stanley Gilbert,* Trial Examiner.

INTERMEDIATE REPORT.

STATEMENT OF THE CASE.

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in Huntington, West Virginia, on May 24, 1960, on complaint of the General Counsel and answer of Gissel Packing Company, herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) of the Act. The

parties waived oral argument and only the Respondent filed a brief.

Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings and Conclusions.

I. The business of the Respondent.

Respondent, a West Virginia corporation, has its office, plant and principal place of business in Huntington, West Virginia, and is engaged in the business of slaughtering and wholesale meat packing. During the year just prior to the filing of the complaint, a representative period, the Respondent had a direct inflow of goods from States other than West Virginia of a value in excess of $1,000,000. I find, as admitted by Respondent, that it is engaged in commerce within the meaning of the Act and that assertion of jurisdiction is warranted.

II. The labor organization involved.

Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the Union), as admitted by Respondent, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices.

The issues involved are whether the actions and statements of various persons who the Respondent admits were supervisors as defined in Section 2(11) of the Act constituted violations of Section 8(a)(1) of the Act.

The Respondent Company is owned and managed by Paula Gissel, president of the Company since 1950, and various members of her family including her several sons.

There is no indication that prior to the period pertinent to this matter any attempts were made by the employees of Respondent to form a union or that any union attempted to organize the employees. During the first or second week of February 1960 Paula Gissel received word that the Union, the Charging Party in this matter, was soliciting the employees of the Respondent to sign membership cards. She became convinced of this fact toward the end of the working day of February 11 when Carson Dillard, a salesman for Respondent, informed her of the activity of the Union.[1] The next morning, February 12, shortly after work commenced, Paula Gissel decided "on the spur of the moment" to address her employees. The plant opened at 6:30 a.m. and the meeting was held between 7 a.m. and 8 a.m. She had never before called a meeting of all the employees and admittedly called this meeting for the purpose of talking to the employees about the Union.

In essence, it is alleged in the complaint that Paula Gissel during the course of the meeting stated or strongly implied:

(a) That before letting in the Union she would close the plant and sell the equipment;

(b) That if the Union got in she would cut down the amount of work so that the plant could be operated by her family;

(c) That she had intended to take out group insurance for the employees but had dropped the idea since some were in favor of the Union;

(d) That employees who were in favor of the Union could get out and find other jobs; and

1. She testified that she had heard about the Union's activities sometime prior thereto but could not identify the persons who had told her. Since she was quite vague as to the details of her prior information and in light of her actions after the report from Dillard, it is quite clear that if she had received earlier word of the Union's activities she was not impressed by its authenticity.

(e) That since she was old enough to draw social security she would rather retire than allow a union to represent the employees.

There is substantial accord among all the witnesses as to what Paula Gissel stated at the meeting except for, in a few instances, variances in wording which would be susceptible of different inferences. Mrs. Gissel at the outset stated that she had heard that a union was trying to get into the plant and that for those who wanted it—a union was a "fine thing" or a "good thing." While it is clear that she made such a statement with reference to "a union," it is quite evident that within the context of the rest of her statements the branding of a union as a "fine thing" did not apply in her mind to the operation of Respondent's plant. At best it can be inferred that she did not object to unions in general or in principle. She left no doubt that she would not accept a union as a bargaining representative of Respondent's employees.

Paula Gissel testified that she said she *might have to* close the plant if the Union came in. Respondent urges that she only indicated that such a result might become an economic necessity in view of the small margin of profit the Respondent enjoyed. In the main, Respondent's position is that Paula Gissel's statements were protected under the right of freedom of speech and constituted nothing more than predictions of economic consequences of unionization of the plant. However, the record is replete with the testimony of credible witnesses which discloses that her statements as a whole were not susceptible to the limited inference Respondent urges. An analysis of the testimony of these witnesses discloses that Mrs. Gissel indicated that she did not intend to accept a union and that rather than do so she would sell the plant, close it, or operate it on a small basis with only her family and possibly a few loyal employees.

Employees who were called as witnesses by General Counsel testified as follows:

Roberta Molihan: that Paula Gissel stated that she knew some of the employees were against her; that she knew about the Union coming in; that no one was going to come in and tell her what to do; that they could operate on a smaller basis and those that wanted to walk out could walk out; and that none of her children would work under a union.

Henry B. Gunnoe: that Mrs. Gissel said she could not stand union wages and would either sell the plant, close it up or operate it with her own family.

Russell Sowards: that Mrs. Gissel said she was an old lady and had worked hard and before she accepted the Union she would close the doors.

Herbert Dunfee: "She said she wouldn't accept no union. That she was too old to have any young smart aleck come in and tell her how to run her business; that she would sell the trucks and equipment and go on social security before she would have the union."

Gaines E. Smith: "As clearly as I can remember she began by saying she had understood we were going to strike, or walk out on her that morning. And she went on to say that she was prepared for us if we were to strike. And she explained to us how since she had worked, and her and her children had worked hard and put their efforts together to build the Company up to what it was. And she said if necessary that she could cut down on the kill, and they could just slaughter enough livestock to keep her immediate family going. And she also said that she was an old lady, and that she wouldn't have any young man to come in and tell her how to run her plant."

Paula Gissel testified that she had said that if the Union came in each employee would have to do a specific job and

that as a result their working hours would be shortened. She admitted that she said that she would not have a young man from the Union come into her plant and tell her how to run it. She also testified that she said that if the plant closed she might have to draw on her social security.

I was impressed by the sincerity of Paula Gissel in her attitude toward the welfare of her employees as individuals and believe her to be a credible witness in this proceeding. By her own testimony it is quite clear she did not limit her statements to economic predictions of unionization of the plant, but clearly indicated that she would not accept the Union as a bargaining representative of her employees.

The testimony, however, does not sustain the allegation that Mrs. Gissel stated that those employees who were in favor of a union should get out. It appears that she might have been laboring under the misapprehension that a strike was imminent and with that in mind she said, as was testified to by Roberta Molihan, that those who wanted to walk out could do so and that the plant could operate on a smaller basis. This was corroborated by the above-quoted testimony of Gaines E. Smith. It cannot fairly be inferred that she was threatening the discharge of any employee or suggesting that those who were in favor of the Union should "get out." At most the testimony as to this part of her statements indicated merely that she was claiming not to be in fear of a strike in that she could operate on a smaller basis if there were one.[2]

With reference to the allegation in the complaint that Paula Gissel told the employees that since some of them were in favor of the Union she was dropping a plan she had been considering to take out group insurance for them,

2. The statements with reference to curtailing operations, however, were not limited merely to the consequences of a strike but extended also to the possibility of the success of the Union's solicitation of membership among the employees.

there seems to be little contradiction in the testimony except as to whether the employees had received word of such plan prior to the meeting of February 12, 1960. The only testimony, however, to support the earlier announcement of the plan was that a slip was sent around the plant to get the names and addresses of the employees. Alfreda Closterman, one of management personnel, testified that the information was requested in connection with arranging for insurance. Gaines E. Smith corroborated the fact that such information was sought but insisted that he had no knowledge that it was for that purpose. I find there was no prior announcement of the plan to the employees and no employee was told of it.

The first announcement that group insurance was being considered was made by Paula Gissel at the meeting on February 12. She testified that she had been planning it from the early part of January 1960 and had been getting estimates and that at the meeting of February 12 she stated that she had been planning to take out group insurance for the employees. The testimony of several of the employees, particularly Roberta Molihan and Henry B. Gunnoe, discloses that Paula Gissel indicated that because of the possibility of the Union coming in she was dropping the plan. She obviously implied that if the Union did not come in they would get the benefit of group insurance. She had no reason to raise the point otherwise, for it had never been announced to the employees and, therefore, this would be the logical inference.

In view of the foregoing I conclude that Paula Gissel's statements were not, as contended by Respondent, limited to merely economic predictions and thus protected, but constituted violations of Section 8(a)(1) in the following respects:

(a) She informed the employees that the Respondent

would not recognize the Union as their bargaining representatives even if the employees desired it.

(b) She indicated to the employees that rather than accept the Union she would close the plant or greatly curtain its operations thus implying that wide spread discharges or layoffs would result.

(c) She clearly implied that if they rejected the Union they would be given the benefit of group insurance.

During the course of the meeting, apparently at the end or toward the end of Paula Gissel's statements, Bonnie Bennett, a foreman, asserted that if he could find out who (apparently in his department) was trying to bring in the Union they would be discharged.[3] Both Bennett and Mrs. Gissel admitted that the statement was made, but insisted, and I so conclude, that it was not authorized by her. However, it is admitted that he had the power to hire and fire without consulting any one.

Respondent contends this statement was adequately counteracted by immediate responses from Paula Gissel and Leoris Gissel. Paula Gissel testified that she said "No, I won't fire nobody. If they don't want to work for me no more they have to quit; they have to lose their own job on their own accord." And that her daughter-in-law, Leoris Gissel, said: "Look, Bonnie, we will fire nobody." Bennett confirmed this testimony. On the other hand Roberta Molihan testified that Leoris Gissel said "No, I don't believe that you should take that attitude; that the Union people can make it look nice" or "can make it look like a bed of roses." Gaines E. Smith testified that Leoris said "No, let's not fire them." Henry B. Gunnoe testified when asked what response Paula Gissel made to Bennett's

3. Although the complaint, in alleging this as a violation of Section 8(a)(1), charged that the statement was made on March 12, 1960, it is assumed that the complaint was referring to this statement made at the meeting of February 12, 1960.

statement: "Well, she didn't tell him to. I think she said, 'That's okay, Bonnie'."

The witnesses are fairly well in accord that it was indicated that the top management did not endorse his statement which he testified he made because he was "half mad." The contradictions only exists with respect to the degree of emphasis with which his utterance was rejected. Paula Gissel was a credible witness and for the most part candid in her testimony. I do not find the testimony of the other witnesses to the incident sufficiently convincing in its exactness as to what she did or did not say to disregard her testimony that she stated that nobody would be fired. Since Bennett had the right to hire and fire without consulting her I have considered whether her repudiation constituted sufficient assurance to those employees in the department in which Bennett was foreman that he would not be able independently to fire an employee whom he thought to be responsible for bringing in the Union. However, the record discloses that thereafter the employees in his department freely indicated to him their attendance at union meetings. Therefore, I am led to conclude that his statement did not, in fact, have the effect of interfering with the rights of the employees guaranteed them under Section 7 of the Act.

After the meeting of February 12, Herbert Gissel, a son of Paula Gissel serving as vice president and foreman of the Respondent, admittedly called a meeting of the meat packers in the latter part of February.[4] It is alleged in the complaint that during the course of this meeting he told the employees (a) that only those who did not sign union

4. Roberta Molihan, who was present at the meeting, testified it was held about a week before the meeting of February 12, 1960. From the record I conclude that Roberta Molihan was mistaken or inadvertently placed the meeting at a time prior to the one of February 12, but that this had no effect on the credibility of the witnesses.

cards would retain their jobs; and (b) that his mother would shut down the plant and draw social security before accepting a union.

Roberta Molihan, whom I have found to be a credible witness, testified as follows with respect to Herbert Gissel's statements:

> A. Well, he said that we knew, some of us knew that there was trying to be a union come in there, and maybe some of us did not know it, but that the children would not work for a union or under a union.
>
> Q. What children?
>
> A. The Gissel family.
>
> Q. Okay. Go ahead.
>
> A. And he said that his mother was old, and that she was going to try to stick by her employees, and the employees that stuck by her would be the ones that would be able to work, and that she was going to try to take out an insurance on us and that would pay us when we were sick and not able to work.
>
> And he said that none of the children would work with a union because they had seen things that were done from a union, and they would not work with a union.
>
> Q. Was anything mentioned about closing?
>
> A. I am not positive, but he did mention that they could—run the plant on a smaller basis, or they could —a family basis, but they could shut down the plant and sell the machinery.
>
> Q. You say you're not positive. Are you positive—
>
> A. He did bring it up, closing, that they would do that.
>
> Q. Was anything said about social security by Mr. Herbert Gissel on that occasion?
>
> A. Just that his mother was old, and that she could draw her social security.

Herbert Gissel in his testimony denied that he had made the statements to which Roberta Molihan testified. His

version of the incident is that he was asked a question by her as to what would happen to the employees who did not sign with the Union and that he replied: ". . . if you didn't sign, and the Union came in, they would have to accept her."

I do not find Herbert Gissel to be a credible witness. He appeared evasive and no explanation was offered as to why he called the meeting or what was discussed therein. I assume that it was called for the purpose of discussing the Union.[5] Under the circumstances and considering the demeanor of the two witnesses I conclude that Herbert Gissel did make the statements attributed to him by Roberta Molihan and that they were violative of Section 8(a)(1) of the Act in that they indicated to the employees: (a) that the management would not accept a union as a bargaining representative of the employees; (b) that there would be discrimination against those employees who did join the Union; and (c) that if the Union came in the management might close the plant or run it on a smaller basis, implying that it would result in wide-spread discharges or layoffs.

Early in March, another son of Paula Gissel, Edward Gissel, who is a vice president of the Respondent and serves as a foreman, engaged in a conversation with a group of several employees in the boning room, during the course of which, it is alleged in the complaint, he stated that his mother would close the plant before she would let a union represent them. William Molihan, an employee called as

5. On cross-examination his testimony was as follows:

Q. (By Mr. Lasher) I direct your attention to the latter part of February, 1960, and ask you if you did not speak at a meeting with employees in the sausage department for the purpose of presenting your side, or the management's side to the so-called Union propaganda which was being disseminated among the employees? Is that true or not? Did you have such a meeting?

A. Yes, I had a meeting.

a witness by the General Counsel, testified that he was present at the time and that Edward Gissel made the statement alleged. Edward Gissel denied making the statement and asserted that he only discussed the subject of a union with employees when they brought it up. He did not recall any particular incident in which he discussed the Union with an employee. William Molihan appeared to be a credible witness and his testimony is accepted as truthful not only because of his demeanor but also because it is consistent with the testimony of other credible witnesses as to the attitude of the management with which undoubtedly Edward Gissel was in accord. Edward Gissel did not impress me as being candid or forthright in his testimony. Therefore, I conclude that Edward Gissel made the statement testified to by William Molihan and that it was a violation of Section 8(a)(1) of the Act.

Also during the early part of March, it is alleged in the complaint, Paula Gissel told an employee that she would not let the Union in and would give the Union $1,000 if they would get out and stay out. Henry B. Gunnoe, who testified with respect to this allegation, was somewhat confused as to when such a statement was made. From his testimony it appears that part of the statement was made in one conversation and part in another. While I do not doubt the sincerity of the witness, his testimony was too confused and inexact to be of much value in ascertaining with sufficient detail what Mrs. Gissel did say to him to enable me to establish its significance. At the most it would appear merely to be corroborative of other testimony with regard to Paula Gissel's attitude toward the Union.

Bonnie Bennett, a foreman, was charged in the complaint to have made a series of statements over the course of the month of March violative of Section 8(a)(1) of the Act, namely:

(a) Telling an employee that Paula Gissel had said she would not have a union in the plant;

(b) Telling several employees on at least two occasions that he did not want to see them at a union meeting and on one of these occasions adding the threat that they would be discharged.

(c) Telling Paula Gissel in the presence of an employee that if she gave him the word he would make it so tough the employees would have to quit; and

(d) Telling Edward Gissel in the presence of an employee that if he, Bennett, had proof as to who had signed union authorization cards, he would discharge them.

I do not find that the record supports the allegation that on or about March 3, 1960, Bennett told an employee that Paula Gissel said she would not have a union. No witness testified to the fact that he made such a statement and Bennett denied making it. This is also true of the allegation that he told Mrs. Gissel in the presence of employees that if she gave him the word he would make it so tough that employees would have to quit.

With respect to the allegation that Bennett told Edward Gissel in the presence of an employee that if he had any proof as to who signed union authorization cards he would discharge them, it appears that the incident started with Gissel asking Bennett whether, if he had proof of their membership in the Union, he would discharge the employees. Apparently more than one employee was present, for Herbert Dunfee testified that Bennett made no answer and Gaines E. Smith testified that Bennett answered that if he were furnished proof, he would. Bennett admitted that he asked Gissel whether he had proof but that the conversation went no further. Bennett also stated in testifying that he did not need proof, that he knew who belonged to the Union, that in their conversations with him the employees indicated their union affiliation. In view of the fact that Bennett's version of the occurrence was corrobo-

rated by Dunfee, I accept it as being correct and conclude that this allegation is not supported by the record.

With respect to the two allegations in the complaint that Bennett told employees that he did not want to see them at union meetings, implying or stating a threat of some discrimination against them if they should attend, Respondent contends that Bennett was joking, that his remarks were not made in a serious vein. Apparently there was a series of conversations between Bennett and employees in his department with reference to their union activities. There were quite a few references to the fact that he, on more than one occasion, said something to the effect that he did not want to see their "smiling faces" at union meetings which Bennett admits saying. Bennett testified that the employees made it quite clear to him in their conversations that they had attended or planned to attend meetings and that there were jokes about the food they ate at the meetings. It is admitted by the employees who testified with respect to the conversations that it was customary for Bennett to joke with them and that they did joke about the union meetings they attended. However, they insist that Bennett was serious when he made the statements alleged in the complaint.

The fact that the conversations and joking about the Union continued over the course of the pertinent period belies the contention that the employees considered Bennett to have been serious. Otherwise they certainly would not have persisted in such conversations and would not have so heedlessly indicated to him their actions with respect to the Union. Bennett appeared to be a candid witness and I do not discredit the employees who testified. As a matter of fact there is little, if any, contradiction in the testimony as to the occurrence to which these two allegations refer. A substantial contradiction only arises with respect to the witnesses' interpretations of Bennett's

manner or intent. Considering the conduct of the employees in continuing to joke with Bennett about their union activities, I conclude that his statements did not have the effect of interfering with any of the rights guaranteed employees under Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The conduct and statements of various persons in the management of the Respondent set forth in Section III, above, considered in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

V. The remedy.

Although I have found that some of the allegations of the complaint have not been sustained by the evidence, I believe that the remaining allegations of unfair labor practices which I have found to have been sustained are of sufficient substance to require a remedial order. While the Respondent is free to indicate its opposition to the Union and reasons therefor it may not in exercising its freedom violate Section 8(a)(1) of the Act, by, as I have found, indicating to its employees: that it would not recognize the Union as their bargaining representative; that if the Union were successful in soliciting membership the Respondent would close its doors or curtail its operations; that if the Union were rejected by the employees the Respondent would give them the benefit of group insurance; or that there would be discrimination against those em-

ployees who did join the Union.[6] In view of these findings, I believe that the affirmative action hereinafter recommended is necessary to effectuate the policies of the Act.

Upon the basis of the above findings and upon the entire record in the case, I make the following:

Conclusions of Law.

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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6. The freedom of management is limited by the prohibition that it may not violate the Act. *N. L. R. B.* v. *McGahey*, 233 F. 2d 406 (C. A. 5).

RECOMMENDATIONS.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Gissel Packing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Stating or intimating that the Gissel Packing Company will not recognize the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union as a bargaining representative which may be selected by its employees;

(b) Stating or intimating that its plant will be closed or operations will be curtailed in the event its employees select the aforesaid union or any other union as their bargaining representative;

(c) Stating or intimating that it will discriminate against any employee in regard to his or her conditions or terms of employment for union membership or union activities;

(d) Stating or intimating that it will grant group insurance or any other benefit to its employees in the event they reject the aforesaid union or any other union as their bargaining representative;

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above named or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in any other mutual aid or protection, or to refrain from any or all such activi-

ties, except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act;

(a) Post in conspicuous places at its plant in Huntington, West Virginia, including all places where notices to employees are customarily posted, copies of the notice attached hereto as the Appendix. Copies of such notice, to be furnished by the Regional Director for the Ninth Region shall, after being duly signed by the Respondent's authorized representative, be posted by it immediately upon receipt thereof in conspicuous places, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material;

(b) File with the said Regional Director within twenty (20) days from the receipt of this Intermediate Report a written report setting forth in detail the steps which Respondent has taken to comply herewith.

It is further recommended that, unless within twenty (20) days from the date of receipt of this Intermediate Report the Respondent notifies the said Regional Director that it will comply with the foregoing Recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated at Washington, D. C. this 21st day of July 1960.

STANLEY GILBERT,
Trial Examiner.

APPENDIX.

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not state or intimate that the Gissel Packing Company will not recognize the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union as a bargaining representative which may be selected by its employees.

We will not state or intimate that its plant will be closed or operations will be curtailed in the event its employees select the aforesaid union or any other union as their bargaining representative.

We will not state or intimate that it will discriminate against any employee in regard to his or her conditions or terms of employment for union membership or union activities.

We will not state or intimate that it will grant group insurance or any other benefit to its employees in the event they reject the aforesaid union or any other union as their bargaining representative.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above named or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in

any other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

GISSEL PACKING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GISSEL PACKING COMPANY, INC.[1]
Employer,

and

FOOD STORE EMPLOYEES UNION, LOCAL No. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,[2]
Petitioner.

Case No. 9-RC-3966.

DECISION AND DIRECTION OF ELECTION.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

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1. The Employer's name appears as amended at the hearing.

2. The Petitioner's name appears as amended at the hearing.

3. The hearing officer refused to continue the hearing until afternoon for the purpose of calling Mr. Mollohan as a rebuttal witness to testify as to his own alleged supervisory status. Although this ruling constituted error, it was not prejudicial so we shall permit Mr. Mollohan, the alleged supervisor of the boning room, to vote subject to challenge. See *American Potash & Chemical Corporation,* 117 NLRB 1508, ftn. 1.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

All production and maintenance employees of the Employer at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Employer, the salesmen foreman, the truck salesmen foreman, the working foremen

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4. The parties stipulated as to the appropriateness of the unit except for the truck driver salesmen, and the placement of certain employees. As the truck driver salesmen, like the truck drivers, have sufficient interest in common with the production and maintenance employees, we include them in the unit. The *Valley of Virginia Cooperative Milk Producers Association,* 127 NLRB No. 95. As the janitor, who spends 3 hours per week cleaning the office, is a regular part time employee, we include her in the unit. *Brown Cigar Co.,* 124 NLRB 1435, 1437. We also include in the unit L. R. Hutchinson, a vice-president's son-in-law, who works in the processing and packaging department, as there is nothing in the record to indicate that he enjoys a special status by virtue of his relationship. *Adam D. Goettl and Gust Goettl, d/b/a International Metal Products Company,* 107 NLRB 65. Alfreda Hutchinson and R. E. Lewis are the daughter and son respectively of vice presidents of the corporation. As the record is inadequate to enable us to determine whether these 2 employees should be excluded from the unit under Sec. 2(3) of the Act, or because they enjoy a special status by virtue of the relationship, we shall allow them to vote subject to challenge.

of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined in the Act.

DIRECTION OF ELECTION.

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by[5] Food Store Em-

5. Employees engaged in an economic strike which began less than 12 months from the date of the election who have been permanently replaced and their replacements shall vote by challenged ballot.

ployees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

Dated, Washington, D. C. Jan. 27 1961.

PHILIP RAY RODGERS,
Member,

JOHN FANNING,
Member,

ARTHUR A. KIMBALL,
Member,

National Labor Relations Board.

NLRB PLEDGE CARDS.

Under NLRB rules, a 30 percent showing on union pledge cards is all that is required to petition for an election. These days, however, few elections are won with such a showing. NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to "get the union off my back." In other cases, the employer urges workers to sign the cards to get a premature election. In still others, workers sign to scare the boss into a raise. Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election.

For these reasons and out of long experience, most organizers will not move forward by filing for an election unless they have at least a majority of the workers signed and that majority looks reasonably solid.

There may be times when, because interest shows signs of waning, the organizer will petition for an election with fewer than 50 percent of the workers signed up. This will depend upon whether it is felt necessary to move ahead regardless of results.

If an election is lost or if an organizer determines that further progress is not possible in a campaign at a given time, thought must be given to withdrawal. The worst thing possible is to "pull out" without warning, leaving workers high and dry.

Aside from other considerations, the union may want to return another day. It may be advisable to counsel with the plant leaders to this effect and to try to keep a nucleus alive. In any case, good-byes in this kind of situation should involve full consideration for those who supported the union and who must continue to work in the plant.

91ST CONGRESS

1ST SESSION

S. 426

A BILL

To amend the National Labor Relations Act so as to require a Board-conducted election in representation cases.

By MR. FANNIN, MR. BENNETT, MR. CURTIS, MR. ERVIN, MR. THURMOND, and MR. WILLIAMS of Delaware.

JANUARY 21 (legislative day, JANUARY 10), 1969

Read twice and referred to the Committee on Labor and Public Welfare

91ST CONGRESS

1ST SESSION

S. 426

IN THE SENATE OF THE UNITED STATES

JANUARY 21 (legislative day, JANUARY 10), 1969

MR. FANNIN (for himself, MR. BENNETT, MR. CURTIS, MR. THURMOND, and MR. WILLIAMS of Delaware) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare.

A BILL

To amend the National Labor Relations Act so as to require a Board-conducted election in representation cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9(a) of the National Labor Relations Act, as amended (29 U. S. C. 159(a)), is amended by inserting before the first proviso therein the following: "*Provided further,* That such bargaining representatives shall have been certified by the Board as the result of an election conducted in accordance with subsection (c):".

SEC. 2. Section 10(c) of such Act (29 U. S. C. 160(c)) is amended by inserting before the period at the end of the third sentence thereof a colon and the following: "*Provided further,* That the Board shall not issue an order to bargain in any case in which the bargaining representative shall not have been certified as a result of an election conducted in accordance with section 9(c)".

SEC. 3. The amendments made by this Act shall not be construed to require the holding of an election in any case in which an employer is required to recognize and bargain with a labor organization pursuant to a valid existing bargaining order entered by the National Labor Relations Board prior to the date of enactment of this Act, or in any case in which on such date an employer is voluntarily recognizing and bargaining with a labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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